

Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, PETITIONER

vs.

TEXACO INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

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Original Print

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 7217

TEXACO INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION TO REVIEW AND SET ASIDE ORDERS OF THE
FEDERAL POWER COMMISSION—Filed February 25, 1963

*The The Honorable United States Court of
Appeals For The Tenth Circuit:*

Texaco Inc., hereinafter called "Petitioner" or "Texaco," pursuant to Section 19(b) of the Natural Gas Act of 1938, as amended, 52 Stat. 831, 15 U.S.C. § 717, *et seq.*, (Act), files this Petition to Review and Set Aside Orders of the Federal Power Commission, hereinafter called "Respondent" or "Commission," issued October 5, 1962 and November 30, 1962. Petitioner advances the following grounds:

I.

NATURE OF THE PROCEEDINGS

This proceeding involves one more tile in the mosaic of illegalities surrounding the issuance and application of Respondent's Order Nos. 232, 232A and 242¹ to Texaco and other independent producers of natural gas who are subject to Respondent's jurisdiction. By its order of

¹ Copies of these orders are attached hereto as Exhibit A.

October 5, 1962, Respondent rejected Texaco's proposed rate schedule (contract) and the related application for certificate of public convenience and necessity by which Petitioner sought to initiate sales of natural gas in [fol. 2] interstate commerce to Natural Gas Pipeline Company of America (Natural). Respondent's rejection is bottomed on its conclusion that Texaco's contract with Natural contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. The regulations referred to are the embodiment of the aforesaid Order Nos. 232, 232A and 242. Petitioner institutes review of this order of rejection because it is aggrieved by the implementation of orders which exceed the authority of the Respondent under the Act. Although Petitioner has sought through rehearing to prompt the Respondent to rectify its illegal actions, by order of November 30, 1962, Respondent has rejected these pleas.

II.

JURISDICTION AND VENUE

1. Texaco is a corporation organized under the laws of the State of Delaware. Texaco's Tulsa Division is located and has its headquarters office in Tulsa, Oklahoma. The Tulsa Division has direct and complete cognizance over the sale of Texaco's gas which is produced in the Camrick Southeast Field, Beaver County, Oklahoma.

The Tulsa Division with its Manager and approximately 750 employees in the States of Oklahoma and Kansas is responsible for the full spectrum of Texaco producing activities and operations in an area including those two states. Significantly, 99.8% of the gas produced under the Tulsa Division's cognizance is produced and sold in Oklahoma and Kansas. Operations conducted from Tulsa include the negotiation of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of State reports and the disposition of the pro-

duction. Hence, the full management, administration and supervision over the oil and gas leases within its territorial boundaries, including the lease affected by the order presented for review, falls to this Division.²

[fol. 3] The contract of May 1, 1962 with Natural was negotiated by executives and personnel of the Tulsa Division in Tulsa, Oklahoma. It covers the sale of gas produced by Texaco only from its properties in the Camrick Southeast Field, Beaver County, Oklahoma, and title to this gas passes to Natural in Oklahoma. The performance of this twenty (20) year contract is under the supervision of the Tulsa Division. All records and accounts relating to this sale, as well as other sales of Texaco's gas produced in Oklahoma are maintained and administered in Tulsa, Oklahoma, payment for gas received is made to the Tulsa Division, and notice concerning this sale must be made to the Tulsa Division.

The filings with the Federal Power Commission required by Sections 4 and 7 of the Natural Gas Act before the sale of Texaco's Camrick Southeast gas could be commenced in interstate commerce were made by the Tulsa Division and executed by its Division Manager.

Thus, as a result of the activities and operations of its Tulsa and Denver Divisions and specifically the cognizance of the Tulsa Division over this sale of gas which is subject to the Commission's orders herein complained of, and the location of the properties affected by the orders here for review, Texaco is located within the Tenth Circuit within the meaning of Section 19(b) of the Natural Gas Act.

2. Respondent is a public body known as the Federal Power Commission, originally created pursuant to the Act of June 10, 1920, 41 Stat. 1063, and organized as an independent commission by the Act of June 23, 1930, 46 Stat. 797. The present members of said Commission are Joseph C. Swidler, Chairman, L. J. O'Connor, Jr., Howard Morgan, Charles R. Ross, and Harold C. Wood-

² Another of Texaco's seven Producing Department Divisions has its headquarters office in Denver, Colorado and it conducts activities similar to those conducted from Tulsa for an area which includes the States of Colorado, New Mexico, Utah and Wyoming.

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ward, and its principal office is at 441 G Street, Northwest, Washington 25, D. C.

3. Section 19(b) of the Natural Gas Act and the provisions of Section 10 of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C.A. § 1009, confer jurisdiction upon this Court to review the orders of the Federal Power Commission herein complained of and by which Texaco is aggrieved.

4. This petition is filed with this Court within sixty (60) days after November 30, 1962, the date upon which the Respondent denied Texaco's application for rehearing.

[fol. 4]

III.

STATEMENT OF THE CASE

On May 1, 1962, Texaco, a natural gas company and an independent producer as defined in Section 154.91(a) of the Respondent's Regulations under the Natural Gas Act, 18 CFR § 154.91(a), agreed to sell; and Natural Gas Pipeline Company of America, a pipeline company engaged in the interstate transmission of natural gas, agreed to purchase certain quantities of gas produced by Texaco from its properties in the Camrick Southeast Field, Beaver County, Oklahoma. The contract between Texaco and its purchaser covers the disposition of natural gas production from this field for a period of approximately twenty (20) years. During the negotiation sessions, the parties hammered out a contract³ (Appendix, pp. 13-46) designed to delineate the duties and enumerate the rights of the respective parties over the protracted sales period. The negotiators gave particular attention to the construction of the pricing provisions (Appendix, pp. 37-38) since the prices derived thereunder would bind and limit the parties through the years of sales—or thereafter until 1982 (Appendix, p. 43).

³ Concurrently with this Petition for Review, Texaco has filed a Motion requesting limited consolidation and other procedural rulings. Attached to that Motion is an Appendix containing the documents which constitute the record in these matters. Certain references are given to that Appendix in this Statement.

Thus, while the May 1, 1962 contract between Texaco and Natural spelled out an initial price, governing first deliveries, it also provided for certain specific price increases at the last three of the four five-year periods into which the contract term is divided:

"... the agreement shall be divided into four (4) five (5) year periods; ... The price for gas delivered during the first period ... shall be seventeen (17) cents; the price for gas delivered during the second period shall be eighteen and one-half (18½) cents; ... during the third period ... twenty (20) cents; ... during the fourth period ... twenty-one and one-half (21½) cents." (Appendix, p. 37)

However, Article X, the pricing provision, also took cognizance of the uncertainties of the market during such a long sales commitment as was contemplated by the [fol. 5] contract. It, therefore, provided limited price renegotiation rights (Appendix, p. 38). Price renegotiation is to be undertaken six months prior to the beginning of the third (1972)⁴ and fourth (1977)⁵ five-year contract periods. The renegotiated price is to be determined on the basis of the average of the highest prices being paid without condition of authorization by the three (other than Natural) interstate pipelines for purchases of natural gas they are making at the time of the renegotiation from fields wholly or partly within Beaver and Texas Counties, Oklahoma. Appropriate adjustments are to be made to insure that prices to be used for comparison purposes cover the delivery and the receipt of gas under conditions comparable to the sales by Texaco to Natural under the May 1, 1962 contract. The contract provides that the renegotiated price will not apply if it is less than the price specified as applicable for the particular five-year period (Appendix, p. 38).

⁴ and ⁵ These dates may be moved back somewhat since Article XVI gears the contract term and the contract periods to "the first day of the month following the first delivery of gas under this Agreement." (Appendix, p. 43) Because of Respondent's actions, here for review, Texaco therefore has been precluded from initiating sales.

Under cover of its letter of August 27, 1962, and as required by Section 4(c) of the Natural Gas Act, 15 U.S.C. § 717(c), and Respondent's procedural Regulations, Texaco submitted the contract of May 1, 1962 to the Respondent for filing (Appendix, p. 9). Concurrently, and pursuant to Section 7 of the Act, 15 U.S.C. § 717(f), Texaco filed its Application for a certificate of public convenience and necessity (Appendix, p. 1). Included in the application was Texaco's sworn invocation of Respondent's Regulation on Temporary Authorizations, 18 C.F.R. § 15.28, by which Texaco notified the Commission that sales by producers on offsetting properties* were causing migration of gas and draftage from Texaco's leases (Appendix, p. 3).

Respondent not only did not authorize Texaco's temporary sales which would stop the gas migration but, by its order of October 5, 1962, the Commission rejected both Texaco's rate schedule filing and its certificate application (Appendix, p. 50). The order stated, *inter alia*:

[fol. 6] "A review of the contract discloses that it contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. Therefore, in accordance with Commission Order No. 242, issued February 8, 1962 . . . and Section 154.100 of the regulations, the proposed rate schedule and related certificate application are hereby rejected. All available copies are returned herewith."

The provisions of Section 154.93 referred to in the October 5 order are the product of Respondent's Order Nos. 232, 232A and 242. Order No. 232 was issued on March 3, 1961, and declared several types of common natural-gas-contract price clauses (including clauses such as Texaco's renegotiation privilege with Natural) to be "inoperative and of no effect at law" in contracts tendered for filing after April 2, 1961. Objections to this

* Respondent's public files show that there are some thirty-one other producers in the Camrick Southeast Field selling natural gas production under some seventy-two contracts with renegotiation clauses similar to that contained in the May 1, 1962 contract.

action were filed by Texaco and numerous other producers, and on March 31, 1961 the Commission amended its Order No. 232 by issuing Order No. 232A which did little to modify the harsh and illegal action of the earlier order.

By Order No. 232A the Commission added the following amendment to the definition of a "rate schedule" in Section 154.93 of its Regulations:

"*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and,

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price re-determination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

[fol. 7] This amendment was effective April 3, 1961, and thereafter the Commission invoked the provisions of this new Regulation as a basis for conditioning temporary and permanent producer certificates by voiding contract provisions other than "permissible provisions." See *Texaco Inc. v. Federal Power Commission*, Nos. 6947 and 7135, pending.

On October 10, 1961, Respondent issued notice of further amendments which it proposed to Section 154.93 and other sections of the Regulations. On February 8, 1962,

disregarding the protests filed by Texaco and others, Respondent issued Order No. 242. This promulgation provided for the outright rejection of contracts, together with their related certificate applications, if "price-changing provisions other than the permissible provisions" are negotiated by the parties and included in the contracts.

It was the Regulations resulting from this series of Commission orders which Respondent invoked in the October 5 order as support for its rejection of Texaco's filings.

On November 1, 1962, following the procedures provided by Section 19(a) of the Natural Gas Act, and the applicable procedural rules of the Respondent, Texaco duly filed an application for rehearing of the October 5 rejection (Appendix, pp. 54-60).

In its application, Texaco pointed out to the Commission that its rejection of Texaco's rate schedule and certificate application was arbitrary, capricious, and discriminatory and far in excess of the authority of the Commission under any provisions of the Act. The Regulations cited by the Commission as the basis for its action were also illustrated to be illegal and arbitrary. However, by order of November 30, 1962, the Commission ignored the arguments advanced by Texaco on application for rehearing and denied relief or rehearing (Appendix, p. 62).

Respondent's grounds for denying rehearing are its reaffirmance of its attempts through so-called rulemaking proceedings to set aside decisions of the United States Supreme Court and to in effect amend the Natural Gas Act.

This petition is filed within sixty (60) days after the order of November 30, 1962 as required by Section 19(b) of the Act.

[fol. 8]

IV.

GROUND ON WHICH RELIEF IS SOUGHT

Texaco reiterates here, and seeks review and relief on the grounds which it pressed upon the Respondent in its application for rehearing, but which were there ignored.

The Commission order of October 5, 1962, and the order of December 1, 1962 therein sought implementation of the Commission's Order Nos. 232, 232A and 242 and are thus erroneous and illegal because:

A. The summary rejection, without notice of hearing of Texaco's application for a certificate of public convenience and necessity, is a violation of Section 7(c) of the Natural Gas Act.

B. The rejection is also violative of Sections 4 and 5 of the Act which prohibit summary proceedings.

C. The Commission's order of October 5, 1962, is not supported by substantial evidence and findings in the record before the Commission as required by Constitutional due process provisions, the Natural Gas Act and the Administrative Procedure Act.

D. The order of October 5, 1962 is unreasonable, arbitrary, capricious, and discriminatory as to Texaco in light of Texaco's rights under the Natural Gas Act and the Commission's treatment of other natural gas companies.

E. The Commission's order of October 5, 1962, rejecting Texaco's application for a certificate of public convenience and necessity, and Texaco's proposed rate schedule, is unlawful because it is based on illegal Regulations. The order of October 5, 1962 rejected Texaco's application and its rate schedule because the contract contained pricing provisions other than those directed by Section 154.93 of the Commission's Regulations and because, under Section 154.100 of the Commission's Regulations (and its Order No. 242), any contracts executed on or after April 2, 1961 containing other than the permitted price provisions are to be rejected.

The portions of the Commission's Regulations relied upon for the rejection of Texaco's filings were adopted as the result of separate orders of the Commission issued without any evidentiary hearing regarding the necessity, [fol. 9] propriety or lawfulness of such regulations. The orders initiating the changes in Regulations were entered over the written protests of Texaco and other producers, both before the Commission and before the courts.

The Orders and the Regulations promulgated in accordance with Order Nos. 232, 232A and 242, relied upon by the Commission, and enforced by the Order of October 5, 1962 are themselves unlawful for each of the following reasons:

(1) They exceed the authority delegated to the Commission under the terms of the Natural Gas Act in that they are neither necessary nor appropriate to the administration of the Act.

(2) These regulations totally circumvent the statutory scheme set forth by Congress in the Natural Gas Act and recognized by the Supreme Court in its decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co. v. Memphis Gas, Light & Water Division*, 358 U.S. 103 (1958). They deprive Texaco and its purchaser of the statutory and Constitutional right to establish the terms, provisions and conditions under which natural gas is to be sold in interstate commerce for resale, subject only to the review powers granted the Commission.

(3) Order Nos. 232, 232A and 242 are in direct violation of the Natural Gas Act itself in that Sections 4, 5 and 7 of the Natural Gas Act provide the standards under which rate filings are to be reviewed and certificate applications are to be considered.

(4) They are violative of the provisions of Sections 5 and 7 of the Administrative Procedure Act.

(5) They are in violation of the Fifth Amendment to the Constitution of the United States in that they deprive Texaco of due process of law.

(6) They are unreasonable, arbitrary and capricious.

(7) They are discriminatory and arbitrary, and therefore unlawful, in that their application will, as in this case, permit other sellers of gas from the same field to have and employ pricing provisions which have been denied to Texaco.

[fol. 10] (8) They are arbitrary and capricious in that they are discriminatory against Texaco in the light of regulation permitting indefinite price filings by other natural gas companies.

(9) They amount to a prejudgment of the lawfulness of the rates which might be filed in the future and preclude such filing and the right to test the lawfulness thereof.

WHEREFORE, Petitioner, Texaco Inc., respectfully requests:

- (a) That a certified copy of this petition to review be forthwith served upon Respondent;
- (b) That the Respondent be required to certify to this Court the record of the proceeding wherein the orders here sought to be reviewed were entered;
- (c) That the proceedings, findings, conclusions and Orders be reviewed by this Court and that the Respondent's rejection and underlying Orders be set aside and that Respondent be ordered to accept Texaco's filings.
- (d) That this Court grant to Petitioner such other and further relief as is required in the premises.

Respectfully submitted:

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December 3, 1962
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FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Frederick Stueck,
Arthur Kline and Paul A. Sweeney.

Docket No. R-153

Nonacceptability of Contracts Between Producers and
Interstate Natural-gas Companies Containing Certain Types
of Automatic Escalation and Favored Nation Clauses

(18 CFR 154.91(a) and 154.93)

ORDER No. 232

AMENDING THE COMMISSION'S
GENERAL RULES AND REGULATIONS

(Issued March 3, 1961)

In this proceeding, the Commission has under consideration a proposed amendment of § 154.93 of its General Rules and Regulations (18 CFR 154.93) respecting the filing of rate schedules containing certain provisions for adjustments in the price of the seller, e.g., "favored-nation", "redetermination", and "spiral escalation" clauses.

General public notice of this proposed rule-making was given by publication in the Federal Register on April 12, 1956 (21 FR 2388) and mailing notices to interested parties, including State and Federal regulatory agencies.¹

In response to such notice, numerous suggestions and comments were submitted by interested parties respecting the changes in the Commission's rules therein proposed. All such suggestions and comments have been carefully

¹ This issue was also fully tried, briefed, and argued before the Commission in *The Pure Oil Company*, Docket No. G-17930, in which decision is being issued this day.

considered, but, for reasons set forth in our findings, we adhere to the rule as originally proposed with certain changes made thereto.

[fol. 12] *The Commission finds:*

(1) The natural gas industry and natural gas service are aided and developed by the use of long-term contracts for the sale of natural gas by producers to pipeline companies or to others, and it is desirable and appropriate in the public interest that long-term contracts be utilized as a basis for considerations of supply and service expansions by natural gas companies.

(2) Long-term gas supply contracts containing provisions for rate changes dependent or based in part on "indefinite escalation clauses", as herein defined have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies. As found by us in the proceeding of *The Pure Oil Company*, Docket No. G-17930, Opinion No. 341 issued concurrently herewith, these indefinite escalation provisions, are contrary to the public interest. Such escalation provisions, therefore, are undesirable, unnecessary, and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies.

(3) It is necessary and appropriate in the public interest and in the proper administration of the Natural Gas Act that § 154.91 (a) of our General Rules and Regulations (18 CFR 154.91 (a)) be amended to include definitions of "definite escalation clause" and "indefinite escalation clause" to define clearly the amendment necessitated by our findings in subparagraph (2) hereof.

The Commission, acting pursuant to authority granted by the Natural Gas Act, particularly Sections 4, 7, and 16 thereof (15 U.S.C. 717c, 717f, and 717o), orders:

(A) Part 154, entitled Rate Schedules and Tariffs and Subchapter E—Regulations Under Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended as follows:

- (1) In § 154.91 (a), change the caption "Definition" to read "Definitions (1)" and adding subparagraphs (2) and (3) to read:

[fol. 13] "(2) 'Definite escalation clause' means any provision in an independent producer's contract for the sale of natural gas in interstate commerce for resale or the transportation of natural gas in interstate commerce which sets forth the price to be paid for natural gas delivered thereunder in terms of a specific price per unit, including, in addition to the initial price, any increases therein by specific amounts at definite future dates, or any provision which changes the specific price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller.

"(3) 'Indefinite escalation clause' means any provision, other than a definite escalation clause as defined in subparagraph (2) hereof, under which the price in a contract for the sale or transportation of natural gas by an independent producer subject to the jurisdiction of the Commission may be determined or changed."

- (2) Adding a proviso at the end of § 154.93, *Rate schedule defined*, to read as follows:

"*Provided*, That any provision for a change of price of the seller by reason of indefinite escalation clauses, as defined in § 154.91 (a) (3), contained in a contract for the sale or transportation of natural gas subject to the jurisdiction of the Commission tendered for filing on and after April 3, 1961, shall be inoperative and of no effect at law."

(B) These amendments shall become effective April 3, 1961. Any interested person may submit to the Commission on or before March 20, 1961, views or comments in writing concerning these amendments.

(C) The Secretary of the Commission shall cause publication of this order to be made in the Federal Register.

By the Commission. Commissioner Kline, concurring in part and dissenting in part, filed a separate statement.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary.

[fol. 14]

Docket No. R-153

Nonacceptability of Contracts Between Producers and Interstate Natural-gas Companies Containing Certain Types of Automatic Escalation and Favored Nation Clauses

(Issued March 3, 1961)

KLINE, Commissioner, *concurring* in part and dissenting in part

I concur completely in the rule insofar as it renders void and inoperative favored nation; spiral escalation and price redetermination clauses in future contracts. I feel such clauses are definitely contrary to the public interest when appearing in gas contracts subject to our regulation.

I am opposed to the rule insofar as it renders void and inoperative provisions in producer contracts permitting price changes arrived at through negotiation or arbitration after a period of five years from the date of the contract. The broad definition of the term "indefinite escalation clause" contained in the rule would eliminate these as well as other unspecified contractual provisions.

It is the practice in the industry for producers to enter into long term contracts for the sale of gas. Such contracts usually run for twenty years or the life of the field which may be fifty or more years. The Commission encourages such long term contracts and this order itself

contains a finding that they are in the public interest. It is impossible for anyone to predict with accuracy the economic conditions so far in the future, what the costs of a producer will be at that time, or what will constitute a just and reasonable price for gas. Yet under the law a natural gas company is bound by its contract and may not unilaterally file for increased rates. *United Gas Pipe Line Co., vs. Memphis* 358 U.S. 103, *United Gas Pipe Line Co. vs. Mobile*, 350 U.S. 322. Under such circumstances a producer should have a contractual right to re-negotiate his contract price at some time in the future in order to protect himself against inflation or other unforeseen contingencies. He should not be compelled to agree at the beginning of his contract to a fixed price for the gas twenty or fifty years in the future, when conditions may be wholly different.

[fol. 15] Many producers have already substituted such negotiation and arbitration clauses in their contracts in lieu of the favored nation and spiral escalation clauses. We have never had a hearing on the issue of whether such provisions are contrary to the public interest, the majority has failed to give any reason for outlawing them, and I can see no reason why we should not permit them.

A contract providing for re-negotiation of the price at some future date, and for arbitration in event the parties fail to agree, merely gives the producer the right to file for such price. The Commission will, of course, disallow it in event it is not a just and reasonable price. Since the gas is already committed to the pipeline, the producer will not have any distinct bargaining advantage. If anything, he will be at a disadvantage, and I see no reason to fear that excessive prices will result, even during the temporary suspension period, as a result of a negotiation and arbitration clause.

I appreciate the difficulty we have in stabilizing gas prices and I would have no objection to a rule finding that it is in the public interest to eliminate even the right to negotiate for a period during which we can reasonably expect economic conditions not to undergo too radical a change, such as a five year period.

In the *Memphis* case, *supra*, the Supreme Court sustained the contention of this Commission that a natural

gas company should have the contractual right to file for an increase even though the amount of the increase is not specifically stated in the contract. We cannot arbitrarily abolish that right but can do so only if the contractual provision supplying the right is against the public interest.

Finally, the adoption of such a broad rule seems to me to be extremely short sighted. Once a rule such as this is adopted, the average business man, as a matter of self preservation, will seek to avoid its effects. Here the producer will undoubtedly seek to protect himself by increasing the initial price or providing for steeper escalations or through some other means. We impliedly put our blessing on definite escalation clauses regardless of the amount. I consider a contract provision calling for a five cent escalation every five years far worse than a contract provision calling for a one cent escalation with the additional provision for negotiations. Yet the adoption of such a rule as this cannot help but lead to some such results.

[fol. 16] In summary, I am opposed to the rule as written because we have never published notice of any intention to adopt such a rule, no showing has been made that all outlawed clauses are against the public interest, and I believe a producer should not be required at his peril to attempt to set prices twenty years in the future, but should be afforded some reasonable means of negotiating a price at a time when he knows the conditions with which he will be faced.

/s/ Arthur Kline,
ARTHUR KLINE,
Commissioner

[fol. 17] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Frederick Stueck,
Arthur Kline and Paul A. Sweeney.

Docket No. R-153

Nonacceptability of Contracts Between Producers and In-
terstate Natural-gas Companies Containing Certain Types
of Automatic Escalation and Favored Nation Clauses

(18 CFR 154.93)

ORDER No. 232A

ORDER MODIFYING ORDER AMENDING THE
COMMISSION'S GENERAL RULES AND
REGULATIONS

(Issued March 31, 1961)

On March 3, 1961, the Commission issued its Order No. 232 in this proceeding amending Sections 154.91 (a) and 154.93 of the Regulations under the Natural Gas Act (18 CFR 154.91 (a) and 154.93). The order provided that indefinite escalation clauses, contained in producer contracts filed on and after April 3, 1961, for the jurisdictional sale or transportation of gas, shall be inoperative and of no effect at law. Since March 3, interested persons have submitted views and comments concerning the amendments to our regulations. Upon consideration of such comments and upon our own further consideration, we find it necessary and appropriate to modify the amendments promulgated by Order No. 232.

We reaffirm our earlier findings that the use of long-term contracts for the sale of natural gas by producers to pipelines or to others is desirable and appropriate in the public interest but that indefinite escalation provisions are, in general, contrary to the public interest. However, it also appears that elimination of all indefinite esca-

tion provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-term contracts, we should permit future [fol. 18] contracts to contain limited price-redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and therefore, controlled).

Also upon reconsideration, it appears that the amendments by their terms apply to any contract filed with the Commission on or after April 3, 1961, even if the contract was executed prior to April 3. The amendments should be changed to apply only to contracts executed on or after April 3, 1961:

We hereby *modify* our Order No. 232, issued March 3, 1961, in this proceeding, in the following manner and order;

(A) Paragraphs (2) and (3) of the Commission's findings are changed to read as follows:

- (2) Gas supply contracts containing provisions for rate changes dependent or based in whole or part on indefinite escalation clauses such as favored-nation, unlimited redetermination or renegotiation, spiral escalation, inflationary adjustment, price indices and revenue-sharing clauses have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies. As found by us in the proceeding of *The Pure Oil Company*, Docket No. G-17930, Opinion No. 341, these indefinite escalation provisions are in general contrary to the public interest. Such escalation provisions, therefore, are generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies. However, limited price-redetermination provisions appear appropriate to meet the difficulty of pricing for long and unpredictable periods and to encourage the negotiation of long term con-

tracts. Limited price-redetermination provisions, as hereinafter ordered, appear to be in the public interest and should be permitted in producer contracts for the sale or transportation of natural gas subject to our jurisdiction.

- (3) It is necessary and appropriate in the public interest and in the proper administration of the Natural Gas Act that § 154.93 of the Regulations under the Natural Gas Act (18-CFR 154.93) be amended to specify the change of price provisions that may be contained in future producer rate schedules submitted for filing with this Commission:

[fol. 19] (B) Paragraph (A) of the Commission's Order No. 232 is changed to read as follows:

- (A) Part 154, entitled Rate Schedules and Tariffs, Subchapter E — Regulations under the Natural Gas Act, Chapter I of title 18, Code of Federal Regulations, is amended by adding a proviso at the end of § 154.93, *Rate schedule defined*, to read as follows: "Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

- (1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
- (2) provisions that change a price to a specific amount at a definite date; and
- (3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or

producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

(C) This amendment shall become effective April 3, 1961.

(D) The Secretary of the Commission shall cause publication of this order to be made in the Federal Register.

By the Commission. Commissioner Kline would further modify the order to permit renegotiation clauses in conformance with the views expressed in his statement accompanying Order No. 232 issued March 3, 1961.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary

[fol. 20]

**UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION****Before Commissioner:****Joseph C. Swidler, Chairman; Howard Morgan, L. J.
O'Connor, Jr., and Charles R. Ross.****Docket No. R-203****Rejection of Sales Contracts Containing Indefinite
Escalation Clauses and of Applications Relying
upon Such Contracts for Gas Supply****ORDER No. 242****AMENDING REGULATIONS UNDER THE
NATURAL GAS ACT****(18 CFR 154.93, 157.14, 157.25)****(Issued February 8, 1962)**

In this proceeding the Commission has under consideration the amendment of §§ 154.93, 157.14 (a) (10) Exhibit H(v), and 157.25, Subchapter E, Regulations Under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations.

By Order No. 232A, issued March 31, 1961 (26 F.R. 2850, 25 FPC 609), the Commission amended section 154.93 of its Regulations so as to provide that indefinite price escalation clauses in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, would be inoperative and of no effect at law. The amendments herein adopted provide for (1) the rejection of contracts containing such indefinite escalation clauses (2) the rejection of applications by producers for certificate of public convenience and necessity relying for a gas supply upon contracts containing such indefinite escalation provisions, and (3) the Commission's refusal to consider such contracts submitted in support of certificate applications by pipeline companies.

Public notice of proposed rulemaking was given by publication in the Federal Register on October 10, 1961 (26 F.R. 9732), and by mailing copies thereof to interested persons, including natural gas companies, and to State and Federal agencies. In response to such notice, numerous comments were submitted. These comments have been carefully considered but, for the reasons set forth below, we adhere to the substance of the amendments as originally proposed.

[fol. 21] A number of parties contend that the promulgation of these regulations would be unlawful and beyond the powers granted to the Commission by the Natural Gas Act. We conclude, however, that sections 4, 5, and 7 of the Natural Gas Act contemplate that the Commission will refuse to approve contractual provisions found adverse to the public interest. Section 16 of the Act, of course, authorizes the Commission to issue rules and regulations of general applicability found necessary or appropriate to carry out the provisions of the Act.

Protection of the public interest is the touchstone of our regulatory powers under the Natural Gas Act. The Commission's obligation under the Act to the natural gas companies, as one segment of the public whose interest is to be protected, does not compel it to acquiesce in the use of contracts which carry provisions incompatible with a scheme of effective rate regulation. To be sure, the proposed rule will have impact upon contractual practices which have been fairly wide-spread. But the real issue is not one of "freedom of contract"; the question is whether the rule is rationally related to a condition which requires correction if regulatory objectives embraced by the statute are to be achieved. See *American Trucking Associations v. United States*, 344 U.S. 298. In our view, the rule we adopt fully meets this test.

We held in the *Pure Oil* case¹ that indefinite escalation clauses are contrary to the public interest and restated this conclusion in Order No. 232A. Increases in producer prices, triggered by indefinite escalation clauses, have resulted in a flood of almost simultaneous filings.

¹ *The Pure Oil Company*, 25 FPC 383.

These filings bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act contemplates that prices, to be just and reasonable, be related to economic needs. The elimination of indefinite escalation provisions does not, of course, cut off other avenues by which a producer may make provision for filing for increased rates.

Filings under indefinite escalation clauses have created a significant portion of the administrative burdens under which this Commission is laboring today. The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification, but not that there shall be a chain reaction in a wide area whenever one [fol. 22] producer in the area negotiates a contract at a new price level. The Act requires the Commission to give precedence to the hearing and decision of rate increases, but the complexity of indefinite price clauses requires it to spend an undue amount of time in their interpretation and application at the expense of making a prompt determination of the rate issues involved. Accordingly, in protecting the public against waves of increases which have no defensible basis, we also serve the need — which we believe we should take into account — of making the tasks of regulation more manageable.

It has been brought to our attention that section 154.93 of the Regulations, as amended by Order No. 232A, refers to the date of execution of a contract, rather than the filing date (to which we referred in the notice of this proceeding). It is suggested that this point should be clarified. The Commission agrees and has made appropriate changes. In order to conform the language of the amendments to our existing regulations, we have also changed the phrase "price-escalation provisions" to "price-changing provisions".

The Commission, acting pursuant to authority granted by the Natural Gas Act, particularly sections 4, 5, 7 and 16 thereof (15 U.S.C. 717c, 717d, 717f, and 717o), orders that Parts 154 and 157, Subchapter E, Chapter I, of Title 18 of the Code of Federal Regulations be amended as follows:

(A) § 154.93 *Rate Schedule Defined*, is amended by adding a provision at the end thereof to read:

Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

(B) § 157.14 (a) (10) *Exhibit H—Total Gas Supply Data* (v), is amended by adding a proviso at the end thereof to read:

Provided, further, however, That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(C) § 157.25 *Necessary exhibits, Exhibit B, Contracts*, is amended by deleting all the language after the first [fol. 23] sentence thereof, ending with the words "Natural Gas Act", and inserting in lieu thereof the following:

On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(D) These amendments shall become effective on April 2, 1962.

(E) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission. Commissioner O'Connor not participating.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary.

[fol. 24]

**DOMESTIC PRODUCING DEPARTMENT
TULSA DIVISION****AUG. 27, 1962****APPLICATION FOR CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY****TEXACO INC.
TULSA DIVISION
CAMRICK SOUTHEAST FIELD
BEAVER COUNTY, OKLAHOMA
CONTRACT 0-54****Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.****Dear Sir:**

We enclose for filing in accordance with Sections 157.23 et seq. of the Commission's Regulations the original and seven (7) copies of an application for certificate of public convenience and necessity.

The designated gas sales contract with Natural Gas Pipeline Company of America is being contemporaneously filed as a rate schedule.

We respectfully call your attention to the request in the application for temporary authorization for the reasons set forth.

Yours very truly,**TEXACO INC.
DOMESTIC PRODUCING
DEPARTMENT****By Signed: O. F. Sebesta
O. F. SEBESTA
Division Manager
Tulsa Division****Enclosure**

[fol. 25]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No.

In the Matter of)
TEXACO INC.)

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY

Texaco Inc., a corporation organized under the laws of the State of Delaware, having a principal place of business in the City of Houston, Texas, and being authorized to do business in all states files this application for a certificate of public convenience and necessity pursuant to the Natural Gas Act and applicable Commission Regulations. The proposed sale is summarized in Exhibit "C".

Communications in regard hereto should be directed to:

Mr. W. V. Vietti, Manager Gas Division
P. O. Box 2332
Houston, Texas

and it is requested that copies be sent to:

Mr. P. F. Schlicher, Attorney
Texaco Inc.
135 East 42nd Street
New York 17, New York

and to:

Mr. O. F. Sebesta, Division Manager,
Texaco Inc.
P. O. Box 2420
Tulsa 2, Oklahoma

[fol. 26] Applicant is informed by its purchaser that gas sold under the authority requested, ultimately will be transported in interstate commerce. The gas to be sold is produced in the Camrick Southeast Field, Beaver County,

Oklahoma, as indicated on Exhibit "A" and is to be delivered to the purchaser at the outlet of the well, or separator at or near the well.

Applicant hereby advises the Commission that an emergency exists because Applicant's properties are being subjected to gas migration by producing wells on leases adjacent to applicant's properties in the Camrick Southeast Field, Beaver County, Oklahoma, and it accordingly invokes Section 157.28 of Subchapter E. Regulations under the Natural Gas Act, to initiate and continue the sale of gas in interstate commerce pending final action of the Commission on this application for a certificate of public convenience and necessity and without prejudice to conditions as may be attached to the issuance of the certificate.

WHEREAS, subject to the foregoing, Applicant respectfully requests that it be issued a Certificate of Public Convenience and Necessity authorizing it to make the foregoing sale under the contract and Applicant hereby requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission and requests that this application be heard under the shortened procedure as provided by Section 1.32, Subchapter A, General Rules of the Commission.

Respectfully submitted,
TEXACO INC.

By Signed: O. F. Sebesta
O. F. SEBESTA
Division Manager
Tulsa Division

[fol. 27]

*[Duly sworn to by O. F. Sebesta jurat
omitted in printing (all in italics)]*

[fol. 28]

EXHIBIT "B"

Pursuant to Section 157.24 (b) and Section 157.25, Subchapter E, Regulations under the Natural Gas Act, Applicant incorporates herein by reference that certain Gas Sales Contract, dated May 1, 1962, between Texaco Inc., Seller, and Natural Gas Pipeline Company of America, Buyer, covering the sale of gas from the Camrick Southeast Field, Beaver County, Oklahoma. Said Gas Sales Contract has been filed with the Commission contemporaneously herewith as Applicant's Rate Schedule.

[fol. 29]

EXHIBIT "C"

CONTRACT SUMMARY

1. Name of Seller: Texaco Inc.
2. Name of Purchaser: Natural Gas Pipeline Company of America
3. Location of Sale: Camrick Southeast Field Beaver County, Oklahoma
4. Date of Contract: May 1, 1962
5. Initial Price per MCF: 17.0¢
6. Measurement Pressure Base (psia): 14.65#
7. Types of Escalation Provisions: Periodic
8. Hydrocarbon Liquids Included: Yes
9. Other Price Adjustments: Periodic Redetermination
Tax Reimbursement: 75% of all new taxes
10. Estimated Initial Volumes (MCF per day): 197
11. Delivery Pressure (psig): Maximum: 90% of Shut-in Pressure
Minimum: 200#
12. Delivery Point: Outlet of well or separator at or near the well.

[fol. 30]

DOMESTIC PRODUCING DEPARTMENT
TULSA DIVISION

Aug. 27, 1962

RATE SCHEDULE
TEXACO INC., TULSA DIVISION
CAMERICK SOUTHEAST FIELD
BEAVER COUNTY, OKLAHOMA
CONTRACT 0-54

Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

We enclose for filing in accordance with Sections 154.92 (b) and 154.93 of the Commission's Regulations, the following:

- (1) Three (3) copies of a Gas Sales Contract dated May 1, 1962, between Texaco Inc., Seller, and Natural Gas Pipeline Company of America, Buyer, covering certain properties in the Camrick Southeast Field, Beaver County, Oklahoma. A copy of this letter is attached to each contract.
- (2) An estimate of the sales and billing for the first month of service is shown on Table I.

Natural Gas Pipeline Company of America is being furnished a complete copy of this material.

An application for a certificate of public convenience and necessity (including a request for the issuance of a temporary certificate) is being filed contemporaneously herewith.

Communications with respect hereto should be directed to Mr. W. V. Vietti, P. O. Box 2332, Houston 1, Texas; Paul F. Schlicher, Texaco Inc., 135 East 42nd Street,

New York 17, New York; and the undersigned at P. O. Box 2420, Tulsa 2, Oklahoma.

Yours very truly,

TEXACO INC.
DOMESTIC PRODUCING
DEPARTMENT

By Signed: O. F. Sebesta
O. F. SEBESTA
Division Manager
Tulsa Division

Enclosure

[fol. 31]

TABLE I

SELLER: TEXACO INC.
PURCHASER: NATURAL GAS PIPELINE COMPANY OF AMERICA
FIELD: CAMRICK SOUTHEAST
COUNTY AND STATE: BEAVER COUNTY, OKLAHOMA
CONTRACT DATE: MAY 1, 1962

Estimated Volume during Month of Initial Delivery
5,910 MCF @ 17.0¢ per MCF \$1,004.70

Volume calculated at pressure base of 14.65 psia, determined and measured as provided in the contract and in accordance with the Oklahoma Standard Gas Measurement Law.

The volumes indicated are gross volumes attributable to the working interest ownership of Texaco Inc. and revenues shown include interests of royalty owners and do not represent the net interest owned by Seller.

It is anticipated that initial service will commence as soon as possible after issuance of the temporary certificate requested in Seller's application filed contemporaneously herewith.

*[Duly sworn to by O. F. Sebesta jurat
omitted in printing (all in italics)]*

[fol. 32]

GAS PURCHASE AGREEMENT
CAMRICK SOUTHEAST GAS POOL
 (Section 1-1N-20ECM)

BETWEEN
NATURAL GAS PIPELINE COMPANY OF AMERICA
AND
TEXACA INC.

DATED: MAY 1, 1952

[fol. 33] * * *

[fol. 34]

GAS PURCHASE AGREEMENT

This Agreement, made and entered into as of the 1st day of May 1962, by and between Natural Gas Pipeline Company of America, a Delaware corporation, hereinafter referred to as "Buyer" and TEXACO INC., a Delaware corporation, hereinafter referred to as "Seller",

WITNESSETH:

WHEREAS, Seller represents that it is the owner of certain oil and gas leases covering land in Beaver, County, Oklahoma, which oil and gas leases are more particularly described as Exhibit "A" attached hereto; and

WHEREAS, Seller represents that said leases, insofar as the land described in Exhibit "A" is concerned, have been unitized with other oil and gas leases for the production of oil and gas, which unit covers all of Section 1, Township 1-North, Range 20 ECM, so that the owner of each leasehold interest will participate in the total quantity of natural gas which may be produced from the unitized area in the proportion which the number of acres covered by said leasehold interest bears to the total number of acres in said Section 1 regardless of the location of the well or wells from which such gas may be produced.

the leasehold and percentage ownership in said unitized area of each of the participants being set out in Exhibit "A"; and

WHEREAS, Seller represents that a well has been completed on said unitized area, known as Morgan No. 1 which well is productive of gas only, or gas with only small quantities of liquefiable hydrocarbons from the Chester Formation; and

WHEREAS, Buyer represents that it owns and operates a natural gas transportation system extending from the Panhandle Gas Field of Texas to termini in the State of Illinois and a gathering system in Texas and Beaver Counties, Oklahoma, connected therewith; and

WHEREAS, Buyer desires to purchase, and Seller desires to sell to Buyer, Seller's interest in gas now available and which may become available from said unitized area under and in accordance with the terms and provisions [fol. 35] hereinafter set forth, to supply a portion of Buyer's requirements for its gas transportation system:

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained, and of the sum of ten dollars (\$10.00) in hand paid by Buyer to Seller, the parties hereto, Seller and Buyer, hereby agree as follows:

ARTICLE I

GAS AFFECTED

(1) Except for such quantities of gas as are hereinafter reserved by Seller, it is understood and agreed that that the gas available for sale and delivery hereunder (hereinafter called the "gas reserves") shall be gas produced from formations situated between the surface of the ground and the base of the Chester Formation of Mississippian Age attributable to Seller's interest in the unitized area described in Exhibit "A" attached hereto. No sale, transfer or assignment of all or any part of Seller's producing property or properties, or gas reserves

located on lands covered by this agreement shall be made by Seller unless such sale, transfer or assignment specifically provides that the purchaser, assignee or transferee thereof shall be bound by all the terms and provisions of this agreement, it being the purpose and intent of this paragraph that Seller shall not sell, assign or transfer, in whole or in part, any of its producing property or properties, or gas reserves located on said lands as aforesaid, so as to deprive Buyer of the right to purchase under the terms and provisions hereof gas produced therefrom.

(2) There is reserved unto Seller from this agreement sufficient gas:

(a) for its own use (and for the use of its subsidiary or affiliated companies) in developing and operating (exclusive of gas lift, repressuring, pressure maintenance or cycling operations) its own oil and gas properties described in Exhibit "A", for the use of such party or parties as may be developing or operating such oil or gas property or properties of Seller, and for sale to a drilling contractor therefor, but in each case only to the extent such gas is required in connection with developing and efficiently [fol 36] operating and producing Seller's said oil and gas properties in accordance with sound engineering and conservation practices.

(b) for sale to a drilling contractor engaged in drilling wells located on Seller's leases in the immediate vicinity of the leases described in Exhibit "A" hereto.

(c) for repressuring, pressure maintenance and cycling operations of the leases described in Exhibit "A", only if such operations are required by valid order or orders of any regulatory authority having jurisdiction.

(d) for the operation of any compressor station or stations of Seller operated in connection with the gas delivered hereunder.

(e) for the operation of Seller's (and its subsidiary or affiliated companies) oil pipeline or lines, compressors, water stations and camps, where the

gas is consumed in the area covered by the properties described in Exhibit "A".

(f) for all other miscellaneous uses, if any, incident to Seller's business of developing, operating for and producing oil, gas and other minerals from the leases described in Exhibit "A" in accordance with sound engineering and conservation practices.

(g) for use by Lessors in accordance with lease agreements referred to in Exhibit "A".

(3) Seller shall not be required by reason of this agreement to drill or rework any well or wells except when in Seller's sole judgment, exercised reasonably and in good faith, such operations are economically feasible. Seller shall not be obligated hereunder to operate any well or wells affected by this contract so as to produce a quantity of gas in excess of the allowable production thereof as fixed by the rules or orders of any regulatory body, State or Federal, having jurisdiction, or in excess of the quantity which said well is capable of producing under sound engineering and gas production practices. Seller shall not be obligated to sell gas-cap gas (defined as gas found in a stratum also containing oil, at a point higher on the structure than oil, the production of which is subject to regulation in relation to the production of oil), provided, however, if any gas well or wells shall be connected to Buyer's gathering systems by either Buyer or Seller under the provisions of paragraphs (1) or (2) of Article III prior to a finding by the regulatory [fol. 37] authority that such well or wells are productive of gas-cap gas, said wells shall remain so connected and the gas produced therefrom shall not be considered as gas-cap gas.

(4) Buyer shall give Seller a least thirty (30) days' written notice of the date upon which it may reasonably expect to commence taking deliveries hereunder.

ARTICLE II

SALE OF GAS AND QUANTITY

1(1) Subject to the other provisions hereof, Seller agrees to sell and deliver, and Buyer agrees to take and

pay for, or failing to take, nevertheless to pay for, a daily quantity of gas, averaged over each calendar year or fraction thereof, from each gas well equal to the least of the following volumes, (hereinafter referred to as the "daily contract quantity");

(a) The daily volume such well is capable of producing at a well head working pressure (psia) equivalent to ninety per cent (90%) of its shut-in well head pressure (psia). "Shut-in well head pressure" as used herein shall mean that pressure resulting from (1) the use of a dead weight tester after a shut-in period of not less than sixty-six (66) hours nor more than seventy-two (72) hours, or (2) if mutually agreeable to the parties hereto, the application of a method or methods for such determination as prescribed by any duly constituted regulatory body having jurisdiction;

(b) Twenty per cent (20%) of such well's daily absolute open flow potential as same may be determined annually by test methods approved by any regulatory body having jurisdiction;

(c) One million (1,000,000) cubic feet per day for each ten billion (10,000,000,000) cubic feet of gas which is estimated to be commercially recoverable from the gas reserves originally in place under the acreage allocated to such well.

(2) It is recognized that from time to time the allocation of production as between wells on the acreage covered hereunder (in the event that more than one well should hereafter be drilled on said acreage) may become subject to rules and regulations of duly constituted [fol. 38] regulatory bodies having jurisdiction and that as a result Buyer may not be permitted to distribute its withdrawals as between wells on the basis of the daily contract quantity as above provided. Buyer agrees in such event and with respect to any such period to nominate as its market requirements from all wells connected to its pipeline system in the area covered by such rules and regulations a volume of gas equal to at least one million (1,000,000) cubic feet of gas per day for each ten billion

(10,000,000,000) cubic feet of gas which is estimated to be commercially recoverable from the gas reserves originally in place under all acreage allocated to productive gas wells connected to Buyer's pipeline in such area and Buyer further agrees in such event to take and pay for, or failing to take, nevertheless to pay for, a daily average quantity of gas hereunder which in the aggregate is equal to at least the sum of the then applicable daily contract quantities (with respect to each gas well) as set forth in paragraph (1) of this Article II, which quantity shall be allocated between Seller's wells to the extent permitted by regulation. It is understood, however, that Buyer shall not be required to take and pay for or pay for, if not taken, any gas hereunder which is in excess of that which Seller is permitted to produce under any such rules and regulations. Should the provisions of this paragraph (2) become operative, then the aforesaid daily average quantity (i.e., which in the aggregate is equal to at least the sum of the then applicable daily contract quantities with respect to each gas well) shall be construed as the daily contract quantity for purposes of this contract. It is agreed that the provisions of this paragraph (2) shall be applied separately with respect to each field or area covered hereunder to the extent that such fields or areas are governed by separate and different rules and regulations insofar as allocation of gas well gas withdrawals are concerned.

(3) Seller will furnish to Buyer within sixty (60) days from the date hereof all basic data which it has available and which is required for Buyer to estimate the commercially recoverable gas reserves originally in place under the acreage allocated to the well completed on said date. Within fifteen (15) days of the completion of each well completed subsequent to said date, Seller will furnish to Buyer all basic data which it has available and which is required for Buyer to estimate the commercially recoverable gas reserves originally in place [fol. 39] under acreage allocated to such additional well or wells. Periodic determinations shall be made of the reserves allocable to all wells covered by this agreement at the request of either party but not oftener than once

every two (2) years. It is understood that any such determination of reserves shall be made by Buyer using basic data supplied to it by Seller and that the sole purpose of any such reserve estimate shall be to determine Buyer's minimum obligation to take gas hereunder pursuant to the provisions of sub-paragraph (c) of paragraph (1) of this Article II and/or paragraph (2) of this Article II. No reserve determination shall increase or decrease Seller's or Buyer's obligation except from and after the date that Seller accepts and approves Buyer's estimate. If Seller disagrees with Buyer's determination of reserves, the matter shall be submitted to the firm of DeGolyer and MacNaughton, Dallas, Texas or its successor unless the parties agree upon some other geological firm. The estimate of the commercially recoverable reserves made by said geological firm shall be final and binding upon both parties. If it becomes necessary to employ a geological firm to make an estimate of such reserves, the cost of such estimate shall be borne equally by the parties.

(4) Buyer may, at its election, at any time and from time to time, take such additional quantities of gas as Seller's gas wells are capable of producing and delivering consistent with the rules and regulations of any regulatory body having jurisdiction; provided, however, Seller shall not be required to produce any gas well in excess of the rate of production of such well as established or determined under sound engineering and gas production practices nor to deliver in any one calendar year an average daily quantity of more than one hundred thirty-five per cent (135%) of the daily contract quantity provided for in paragraphs (1) and/or (2) of this Article II.

(5) In the event (subject to paragraph (10) of this Article II) Buyer shall fail to take during any calendar year, or applicable portion thereof, the minimum daily average quantity from each gas well as herein provided, and such failure is not due to the physical or legal non-availability of gas, causes within the control of Seller or force majeure intervention, then within thirty (30) days after the end of such calendar year, Buyer shall pay Seller the difference between the daily contract quantity [fol. 40] required to be taken and the amount actually taken by Buyer during such calendar year. Payment shall

be made at the weighted average price paid by Buyer for gas taken hereunder during such calendar year. In the calendar year subsequent to that in which Buyer failed to take the gas so paid for, all gas taken by Buyer which is in excess of the daily contract quantity for such well for such year shall be known as "make up gas" and shall be without charge except for the difference in price, if any, between the price previously paid for the "make up gas" and the current price in effect at the time of taking, for gas delivered under the terms of this contract, and until such excess is equal to the amount of gas previously paid for but not taken or until the said calendar year provided for the taking of "make up gas" has passed.

(6) Should one or more of the then existing gas wells on the acreage covered hereunder be incapable of producing the maximum quantities Buyer is entitled to take under the provisions of paragraph (4) of this Article II, then and in such event upon request of Buyer the daily contract quantity with respect to any such well shall be reduced in proportion to such well's inability to produce such maximum quantity for so long as such well is incapable of producing such maximum quantity.

(7) Each party recognizes that wells of Seller producing gas covered by this agreement may from time to time produce such gas from the same reservoir as that from which gas is produced by wells of other producers from which Buyer is taking or may hereafter take gas, and Buyer therefore agrees to take gas ratably from such wells of Seller in proportion to Buyer's taking of gas from wells of other producers in the same reservoir.

(8) Subject to the further provisions of this paragraph (8) Seller shall have the right to sell and deliver to parties other than Buyer (or otherwise dispose of) gas in excess of the maximum quantities as set forth in Paragraph (10) of this Article II (herein referred to as "surplus gas"). The quantity of such surplus gas shall be the difference between the remaining reserves producible from the leases covered by this contract and one and one-half ($1\frac{1}{2}$) times the undelivered quantities as set forth in said paragraph (10) of this Article II. Seller shall have the right to make

[fol. 41] any disposition of such surplus gas, if any, it desires, provided that the production and sale of such surplus gas shall not interfere with the taking of gas by Buyer hereunder.

Subject to the reservations set out in Article I, Seller agrees not to intentionally deplete the gas reserves so as to reduce such gas reserves below one and one-half ($1\frac{1}{2}$) times the undelivered maximum quantities as specified herein; provided, however, if Seller unintentionally reduces such reserves below one and one-half ($1\frac{1}{2}$) times said maximum quantities at any time, Seller shall not be liable to Buyer for any breach hereunder; and provided further Seller shall have the right from time to time (and only so long as such condition prevails) to sell and dispose of any gas which in its judgment, exercised in good faith, is necessary to prevent undue migration or drainage from any lease described in Exhibit "A", after first offering to Buyer the right (to be exercised within thirty (30) days after written notice of the quantities involved and an explanation of existence and amount of drainage) to purchase such gas hereunder, in addition to the quantities herein provided.

(9) With respect to any gas well completed as of the date hereof, Seller's obligation to sell and deliver and Buyer's obligation to take and pay for, or failing to take nevertheless to pay for, the daily contract quantity shall commence ninety (90) days from the date that all of the owners of oil and gas leasehold interests included within the unitized area described in Exhibit "A" shall have furnished Buyer written notice that they have accepted their Certificates of Public Convenience and Necessity provided for in Article XIX hereof. With respect to wells completed subsequent to the date hereof, subject to subparagraphs (a) and (b) of paragraph (1) of Article III, Seller's obligation to sell and deliver and Buyer's obligation to take and pay for, the daily contract quantity shall commence sixty (60) days following the date that Buyer shall be furnished the basic data referred to in paragraph (3) of Article II.

(10) Notwithstanding anything to the contrary in this agreement, Buyer shall in no event be required to take, or

if tendered and not received, to pay for more than one million (1,000,000) cubic feet of gas per day averaged over any calendar year from gas well/s located on the Unit Area, described in Exhibit "A". The maximum volume [fol. 42] provided in this paragraph shall not include oil well gas or gas-cap gas which may be delivered hereunder.

(11) Notwithstanding anything to the contrary in this agreement, Seller shall in no event be required to deliver in any one calendar year an average daily quantity of more than one hundred thirty-five per cent (135%) of the maximum quantity required to be taken or paid for by Buyer in paragraph (10) of this Article II. The maximum volume provided in this paragraph shall not include oil well gas or gas-cap gas which may be delivered hereunder.

(12) To meet the exigencies of Buyer's operations, Buyer may vary its receipts of gas hereunder; provided Seller shall not be required to deliver more than one hundred thirty-five per cent (135%) of the daily contract quantity on any one day; provided further to assure Seller that the gas wells covered hereunder and connected to Buyer's gathering system will remain on a continuous and uninterrupted productive status, Buyer agrees, subject only to force majeure, to purchase each calendar month a daily average quantity of gas from each such well equal to at least sixty-five per cent (65%) of such well's daily contract quantity.

ARTICLE III

BUYER'S GATHERING SYSTEM

(1) Subject to the other provisions hereof, Buyer agrees to construct a gathering system to connect the gas wells (now or hereafter drilled by Seller) on leases described in Exhibit "A" to Buyer's interstate natural gas transportation system; provided Buyer shall not be required to extend such gathering system:

(a) except as there may be an open flow potential of any gas well equal to two million four hundred thousand (2,400,000) cubic feet of gas per mile of

gathering system to be installed for the particular well, or

(b) to any well having a shut-in well head pressure less than five hundred (500) psig.

[fol. 43] (2) Gas available from gas wells to which Buyer is not obligated to connect as aforesaid may be delivered by Seller (if Seller so elects), to Buyer at a mutually agreeable point near Buyer's gathering system at the operating pressure maintained therein from time to time at said point, it being understood that in all other respects this contract shall govern as to the sale and purchase of any such gas.

(3) It is understood that Buyer shall have no obligation to construct a gathering system to oil wells productive of oil well gas or gas wells productive of gas-cap gas now or hereafter drilled by Seller on the acreage covered hereunder and Buyer shall not be required to purchase gas produced from such wells; but such gas may be delivered hereunder upon supplemental agreement between Buyer and Seller. The term "oil-well gas" means gas found in an oil stratum and produced from such stratum with oil.

ARTICLE IV

POINT OF DELIVERY

(1) The point of delivery of gas to be delivered by Seller to Buyer hereunder shall be at the side gate (such gate of suitable size to be furnished by Seller) of the well head of each gas well to which Buyer is required to extend its gathering system and located on the acreage covered hereunder or unified therewith, except that if Seller installs a separator for the removal of hydrocarbon liquids, the point of delivery shall be at the discharge side of such separator; and title to the gas shall pass from Seller to Buyer as so delivered. In the event gas is delivered under the terms of paragraph (2) of Article III hereof, the point of delivery for any such gas shall be at a mutually agreeable point near Buyer's gathering system.

(2) If Seller should elect to process the gas, as provided in Article VI hereof, Buyer shall gather same as the

property of Seller, redeliver same to the processing plant, and Seller shall deliver the residue gas to Buyer at the outlet of said processing plant, at which point title shall pass to Buyer.

[fol. 44]

ARTICLE V

DELIVERY PRESSURE

(1) Subject to the further provisions of this Article V, Buyer agrees that the pressure in its gathering system will be not more than ninety per cent (90%) of the shut-in wellhead pressure (as hereinbefore defined) at each point of delivery provided for in paragraph (1) of Article IV hereof, except the points of delivery for gas delivered under the terms of paragraph (2) of Article III hereof, but in no event shall Buyer be required to keep its pressures less than two hundred (200) pounds per square inch gauge.

(2) In the event that any of Seller's gas wells are temporarily incapable of production against such maximum pressure in Buyer's gathering lines, then Buyer's obligation with respect to the daily contract quantity as hereinbefore set forth in Article II shall be suspended insofar as that particular well is concerned for the period of time during which such well remains incapable of production against such maximum pressure.

(3) Seller shall have the right, but not the obligation to install and maintain at its expense compression equipment in order to meet requirements hereunder insofar as pressure is concerned. In the event that Seller does not desire to compress the gas for delivery hereunder when necessary, Seller shall have the right to withdraw from the operation of this agreement the wells and the acreage attributed thereto from which gas is produced at pressures insufficient to enter Buyer's pipeline, but only as to the then producing formations.

ARTICLE VI

EXTRACTION OF LIQUIDS

(1) Subject to the provision of this Article, Seller may cause the gas delivered hereunder to be processed for the

recovery of natural gasoline and other hydrocarbons, but only in the gasoline plant which has been constructed by or on behalf of The Texas Company now Texaco Inc. and others on Buyer's gathering system; provided that in such event Seller shall cause the Operator of said plant (herein [fol. 45] referred to as such) to process the gas so that: the residue gas remaining after processing will contain at least one thousand (1,000) British thermal units per foot; the dew point of the residue gas delivered to Buyer shall be no higher than that of the commingled gas delivered from the gathering system to the plant; the residue gas shall contain no additional extraneous or deleterious materials; the decrease in pressure of the gas between the inlet and outlet of the processing plant shall be no more than requisite for its efficient operation and in no case more than 15 pounds per square inch; the residue gas shall have a temperature not substantially higher than that of the unprocessed gas delivered to the plant.

(2) In the event of such processing, Seller shall further cause the Operator: to install measuring equipment and measure the volume of gas taken from Buyer's gathering lines and the volume returned, such measurement to be in accordance with the provisions of Article VIII (those applicable to Buyer applied to the Operator and those applicable to Seller applied to the Buyer); to return to Buyer at the point of delivery a volume of residue gas equal to the difference between the volume received by the plant and the volume consumed in the extraction process (including plant fuel); to furnish Buyer a monthly statement on or before the 20th of each month showing (i) the total volume of residue gas delivered after processing during the previous month and the volumes of such residue gas attributable to each point at which unprocessed gas entered Buyer's gathering system, and (ii) the total volume of gas consumed in the extraction process (including plant fuel) during the previous month, and volumes of such gas attributable to each point at which unprocessed gas entered Buyer's gathering system, conditioned that Buyer shall furnish the plant operator a monthly statement on or before the tenth (10th) day of each month showing the points at which unprocessed gas

entered its gathering system and the volumes received at each such point during the preceding month.

(3) In the event of such processing, Seller shall pay Buyer one cent (1¢) per thousand cubic feet for gathering that volume of gas consumed in the extraction process (including plant fuel); provided, however, should Buyer be required to install field compression equipment [fol. 46] in order to maintain pressures in its gathering system in accordance with the provisions of paragraph (1) of Article V, Seller shall thereafter pay Buyer an additional one-half cent ($\frac{1}{2}$ ¢) per thousand cubic feet for compressing said gas.

ARTICLE VII

QUALITY

(1) Seller agrees that the gas delivered from each well shall be gas as obtained in its natural state, and

(a) shall be commercially free from objectionable odors, dust or other solid or liquid matter which might interfere with its merchantability or cause injury to or interference with proper operations of the lines, regulators, meters or other appliances through which it flows;

(b) shall contain less than one-half ($\frac{1}{2}$) grain of hydrogen sulphide per hundred (100) cubic feet of gas volume as determined by the cadmium sulphate quantitative test as presently prescribed by the regulations of the Railroad Commission of Texas;

(c) shall not contain more than twenty (20) grains in total of sulphur compounds per hundred (100) cubic feet of gas volume.

(2) If the total heating value of the gas delivered by Seller hereunder shall at any time fall below one thousand (1,000) British thermal units per cubic foot at the point or points of delivery or fail to conform to any of the other specifications set forth in this Article, then Buyer agrees to notify Seller of such deficiency and Buyer thereupon may at its option and without obligation refuse to accept delivery of such inferior gas pending correction by Seller,

which correction shall not be obligatory unless such deficiency is due to gasoline or liquid hydrocarbon extraction by Seller, except that Seller shall discontinue delivery from any particular well causing the deficiency in quality.

(3) In the event the gas offered for delivery by Seller and accepted by Buyer shall have a total heating value at the points of delivery below one thousand (1,000) British thermal units per cubic foot; the price per one [fol. 47] thousand (1,000) cubic feet hereinafter provided for shall be decreased for any such gas so deficient in heating value by an amount equal to the product of the price times a fraction, the numerator of which is the deficiency in total heating value per cubic foot below one thousand (1,000) British thermal units, expressed in whole numbers to the next highest multiple of five (5) British thermal units, and the denominator of which is one thousand (1,000).

(4) In the event the gas offered for delivery by Seller shall at any time have a total heating value at the points of delivery below one thousand (1,000) British thermal units per cubic foot and such deficiency is caused by the fact that Seller is producing gas from wells which have a total heating value below one thousand (1,000) British thermal units per cubic foot Seller may, in order to raise the total heating value of the gas to or above one thousand (1,000) British thermal units per cubic foot, except as Buyer is willing to accept gas of less BTU content, withdraw from this agreement the wells and the gas leases, or portions of leases attributable to such wells, from which Seller is producing or receiving the gas having a total heating value below one thousand (1,000) British thermal units per cubic foot.

(5) Should gas available from any well covered hereunder fail to conform to the above quality specifications, the parties shall immediately after ascertaining that fact endeavor to negotiate a basis upon which to include such gas under the terms of this agreement; it being understood that (1) if Buyer elects to treat any such gas to make same meet said quality specifications, a mutually agreeable compensating adjustment shall be made with respect to the price to be paid to Seller for any such gas

so treated by Buyer, and (2) if Seller elects to treat any such gas to make same meet said quality specifications, the prices hereinafter set forth in Article X shall prevail insofar as any such gas is concerned. In the event that neither party elects to treat such gas to meet said quality specifications as provided hereunder, Seller shall have the right to withdraw from the operation of this agreement the wells and the acreage attributed thereto from which gas is produced which fails to conform to the above quality specifications, but only as to the then producing formations.

[fol. 48]

ARTICLE VIII

MEASUREMENT AND MEASUREMENT EQUIPMENT

(1) The unit of volume for the measurement of all gas delivered under this contract shall be one (1) cubic foot of gas at a base temperature of sixty degrees (60°) Fahrenheit and a total pressure base of fourteen point six five (14.65) pounds per square inch absolute, and the readings and registrations of the metering equipment herein provided for shall be computed in terms of such unit. Measurement and computations of the volume shall be in accordance with the Gas Measurement Committee Report Number 3 of the Natural Gas Department of the American Gas Association, dated April 1955, together with all amendments, appendices and additions to said report. Measurement equipment and the installation of same shall be in accordance with specifications set out in such report. For the purpose of computing measurements under the aforesaid Report Number 3, the following factors shall be determined and applied in the following manner:

(a) The atmospheric pressure is assumed to be thirteen point two (13.2) pounds per square inch absolute irrespective of the actual barometric pressure or in variations of the same from time to time.

(b) The Reynolds number factor, the expansion factor, and the manometer factor are assumed to be one (1) irrespective of the actual value of these factors.

(c) The specific gravity of the gas shall be determined every six (6) months by joint tests or as much oftener as is found necessary in practice or, at either party's option, as often as once each month. The method of test used shall be by Edward's Balance or by such other methods as shall be agreed upon by the parties. The regular tests, at the first of each (6) month period shall determine the specific gravity to be used in the computations for the measurement of gas deliveries during such period or until changed by special tests, the special tests to be applicable from the date made and through the following days to and including the last day of such period or until further special tests are made.

(d) The deviation from Boyle's Law at each of the points of delivery hereunder shall be determined once each year, or as agreed between the parties, and the [fol. 49] proper supercompressibility factor so determined shall be used in computing measurements hereunder.

(e) The temperature of the flowing gas shall be assumed to be sixty degrees (60°) Fahrenheit; provided, however, that either party hereto may at its option at any time, install recording thermometers to properly record the temperature of the gas flowing through the meters, and the temperatures so recorded shall be used in computing such measurements.

(2) Buyer shall install, maintain and operate, at its own expense at each of Seller's wells or separate delivery point near Buyer's gathering system, orifice meters of ample size and type for the accurate measurement of the gas received by it hereunder, and will cause said meters to be read at least once each week. The location of meters and the method of setting meters shall be such as to prevent pulsations of compressors from interfering with accurate measurements. Seller shall provide Buyer with an adequate site or sites for such meters and the right of ingress and egress to the extent permitted under the terms of Seller's oil and gas leases. The respective meters, meter readings and meter charts shall be accessible to inspection and examination by Seller at all reasonable times. The meters shall be calibrated at least once each month and

orifice plates and meter connections shall be inspected at least once each year and replaced or repaired if found faulty by and at the expense of Buyer but in the presence of Seller, if Seller so elects. Reading, calibration and adjustment of Buyer's meters and changing of charts shall be done by Buyer, but all data with respect thereto shall at all times be available to Seller. If upon any test the percentage of inaccuracy shall be two per cent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half ($\frac{1}{2}$) of the time elapsed since the last date of calibration. Following any test, metering equipment found inaccurate shall be immediately restored by Buyer as closely as possible to a condition of accuracy. If for any reason any meter is out of service and/or out of repair so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered through the period such meter is out of service and/or out of repair shall be estimated and agreed upon [fol. 50] by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation;

(b) By using the registration of Seller's check meter if installed and accurately registering;

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

(3) Seller may, at its option and expense, install and operate check meters to check Buyer's meters, but measurements of gas for the purpose of this contract shall be by Buyer's meters only, except in cases herein specifically provided to the contrary. Check meters shall be of orifice type and shall be subject to all reasonable times to inspection or examination by Buyer, but the reading, calibration and adjustment thereof and changing of charts shall be done only by Seller.

(4) To the extent that the provisions of this Article VIII are in conflict with any applicable state statutes providing for compulsory standard gas measurement, it is recognized and agreed that the latter shall prevail and govern with respect to gas covered hereunder.

(5) Buyer shall give notice to Seller of the time of all tests of gas delivered hereunder or of any equipment used in measuring or determining the nature or quality of such gas, in order that Seller may conveniently have its representative present.

ARTICLE IX

TESTING AND TESTING EQUIPMENT

If it becomes necessary to measure the BTU content of any gas delivered hereunder: Buyer shall install, maintain and operate at its own expense such calorimeters and other instruments as may be necessary for the accurate determinations of quality of the gas delivered hereunder, and will cause such testing equipment to be operated to secure such tests as may be required by Article VII above. Such [fol. 51] testing equipment shall be maintained in accurate calibration by and at the expense of Buyer, and all of the records, data and calculations derived therefrom shall be accessible to inspection and examination by Seller at all reasonable times. Calibration and adjustment of Buyer's equipment shall be done only by Buyer but in the presence of Seller, if Seller so elects.

ARTICLE X

PRICE

(1) Subject to the other provisions hereof, Buyer shall pay Seller for each one thousand (1,000) cubic feet of gas delivered hereunder (or for which payment is due) the prices stated as hereinafter provided. For such purpose the agreement shall be divided into four (4) five (5) year periods; the first being the first five (5) years of the delivery term, and the remainder following successively such first period. The price for gas delivered during the first period (and any period prior to its commence-

ment) shall be seventeen (17) cents; the price for gas delivered during the second period shall be eighteen and one-half ($18\frac{1}{2}$) cents; the price for gas delivered during the third period shall be twenty (20) cents; the price for gas delivered during the fourth period shall be twenty-one and one-half ($21\frac{1}{2}$) cents.

(2) At least six (6) months prior to the beginning of the third five (5) year period of the delivery term and at least six (6) months prior to the beginning of the fourth five (5) year period of the delivery term, Buyer and Seller shall endeavor to agree upon a renegotiated price to be paid during the succeeding five (5) year period in lieu of the price as provided herein. The parties hereto shall, for each of the periods respectively, upon facts existing six (6) months prior to each such period, determine and fix as the renegotiated price for such ensuing period the average of three (3) prices, each of which gives the highest price provided to be paid by one of the three (3) different purchasers of gas for re-sale in other states for ultimate public consumption paying the highest prices to producers for gas being produced from a field or fields lying wholly or partly within Texas and Beaver Counties, Oklahoma, under agreements arrived at by arm's length bargaining, which agreements are in existence without condition of authorization of any regulatory authority not then granted six (6) months prior to the beginning of [fol. 52] such period, between such producers and such purchasers (non-affiliated with such producers); provided, however, no such agreements shall be considered which provide for a yearly quantity greater than the quantity purchased by Buyer from Seller hereunder during the preceding year. The price so fixed shall be fixed in cents per thousand (1,000) cubic feet for the five (5) year period based upon the determinable prices in such agreements and provided further that such price shall not be less than the price provided for such period herein by Paragraph (1) hereof. In the event the contracts considered in determining the price hereunder contained provisions varying from the corresponding provisions of this agreement with respect to differences in tax allowances, methods of computation of quantities, and any other differences in pres-

sure base or payment for gathering, compression, quality, dehydration or any other matter having a bearing on price, then the variations in such provisions shall be taken into account and appropriate adjustments in the stipulated prices set out in such contracts shall be made to compensate for such variations to arrive at an adjusted price which will cover deliveries and receipt of gas under conditions comparable to those set out herein."

ARTICLE XI

STATEMENTS

(1) On or before the 25th day of each month Buyer will render to Seller a statement for all gas delivered and taken hereunder during the preceding month, according to the measurements, terms, conditions and prices herein provided.

(2) Both Seller and Buyer shall have the right to examine at reasonable times, books, record and charts of the other to the extent necessary to verify the accuracy of any statement, charge or computation made under or pursuant to any of the provisions of this agreement.

ARTICLE XII

PAYMENTS

(1) Buyer agrees to pay to Seller at its address as designated pursuant to paragraph (3) of Article XVIII hereof, on or before the 25th day of each month, for [fol. 53] all the gas delivered and taken hereunder during the preceding month, according to the measurements, terms, conditions and prices herein provided.

(2) Seller agrees to make payment for all royalties due on the gas delivered hereunder.

(3) If Buyer fails to pay all of the amount due for gas delivered hereunder, as herein provided, when such amount is due, interest on the unpaid portion shall accrue at the rate of six per cent (6%) per annum. If such failure to pay continues for thirty (30) days after payment is due, Seller, in addition to any other remedy

which it may have hereunder, may suspend further delivery of gas until such amount is paid; provided, that such provision shall not apply if Buyer's refusal to pay any amount claimed by Seller is the result of a bona fide dispute, and Buyer pays all amounts not in dispute.

(4) Each party hereto shall have the right of all reasonable times to examine the books and records of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to this agreement. Any statement shall be final as to both parties unless questioned within one (1) year after payment thereof has been made.

ARTICLE XIII

TAXES

(1) The term "tax" as used in this Article XIII shall mean any excise tax (other than ad valorem, income or excess profit taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sale price of the gas in question, provided, however, that the term "tax" shall not be deemed to include any general gross receipts tax, general gross income tax, general occupational or license tax, or general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

[fol. 54] (2) Subject to the provisions of paragraph (3) of this Article XIII, Seller agrees to pay or cause to be paid all taxes imposed on Seller on or with respect to the gas delivered hereunder prior to its delivery to Buyer, and Buyer agrees to pay or cause to be paid all taxes imposed on Buyer on or with respect to the gas delivered hereunder after its receipt by Buyer.

(3) In the event at any time there is imposed by legislation effective after the date hereof, new or additional taxation upon Seller by reason of the production, severance, gathering, transportation, sale or delivery of gas hereunder, which operates to increase the rate of

taxation, then such increase shall be borne in the proportion of twenty-five per cent (25%) by Seller and seventy-five per cent (75%) by Buyer. It is understood with respect to any such taxes based upon a percentage of value that the provisions of this paragraph (3) will become operative only to the extent that such percentage of value may be increased by legislation above such percentage of value in effect on the date hereof.

(4) The provisions of the preceding paragraph shall apply to eight-eighths (8/8) or one hundred percent (100%) of the gas delivered hereunder.

ARTICLE XIV

WARRANTY OF TITLE—ASSIGNMENT OF RIGHTS

(1) Seller agrees that it hereby does warrant that it will at the time of delivery have good title to all gas delivered by it to Buyer hereunder, free and clear of all liens, encumbrances and claims whatsoever, that it will at such time of delivery have good right and title to sell said gas as aforesaid and that it will indemnify Buyer and save it harmless from all suits, actions, debts, accounts, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties, taxes, license fees, or charges thereon, which are applicable before the title of the gas passes to Buyer. In the event any adverse claim of any character whatsoever is asserted in respect to any of said gas, Buyer may retain the purchase price thereof up to the amount of [fol. 55] such claim without interest until such claim has been finally determined, as security for the performance of Seller's obligations with respect to such claim under this Article XIV, or until Seller shall have furnished bond to Buyer, in an amount and with sureties satisfactory to Buyer, conditioned for the protection of Buyer with respect to such claim. In addition, if Buyer is made the party to any suit, claim or demand in respect of the title to the gas delivered by Seller hereunder, Buyer shall promptly notify Seller thereof and may require Seller to defend the same in its stead; if Seller should fail or refuse to do so, however, Seller shall reim-

burse Buyer for all costs, fees, and other expenses directly incident to Buyer's defense thereof.

(2) In consideration of the fact that Buyer will measure the gas herein provided for at the wellhead and it consequently will be necessary for Buyer to install, read, check and repair meters, Seller hereby transfers, assigns and sets over to Buyer such easements, rights of way and other rights for gathering lines, ingress and egress as are vested in Seller under its several oil and gas leases for such purposes and Buyer shall have the same rights in the premises as Seller for the purposes of this agreement for the term hereof.

ARTICLE XV

FORCE MAJEURE

(1) In the event of either party being rendered wholly or in part by force majeure unable to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that on such party's giving notice and full particulars of such force majeure in writing or by telephone to the other party as soon as possible after the occurrence of the causes relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall, as far as possible, be remedied with all reasonable dispatch.

(2) The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, [fol. 56] earthquakes, fires, storms, floods, washouts, arrest and restraint of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery, necessity of repair or shutouts of wells, gathering system or transportation system, sudden partial or sudden entire failure of natural gas wells, failure to obtain materials and supplies due to governmental regulation, and causes of like or similar kind, whether herein enumerated or not, and not within the control of the party claiming suspension, and

which by the exercise of due diligence such party is unable to overcome.

ARTICLE XVI

TERM

Subject to the termination of this agreement pursuant to the provisions of Article XIX hereof, this Agreement shall be effective from the date hereof, and shall continue until the expiration of twenty (20) years (such period herein referred to as the 'delivery term') commencing on the first day of the month following the first delivery of gas under this Agreement.

ARTICLE XVII

REGULATIONS

Subject to the termination of this agreement pursuant to the provisions of Article XIX hereof, this agreement, insofar as it is affected thereby, shall be subject to all applicable laws, ordinances, rules and regulations, State, Federal or local, and in event this agreement or any provision hereof shall be found contrary to or in conflict with any such law, ordinance, rule or regulation, the latter shall be deemed to control.

ARTICLE XVIII

MISCELLANEOUS

(1) No modification of the terms and provisions of this agreement shall be or become effective except by the execution of supplementary written contracts.

[fol. 57] (2) No waiver by either party of any one or more defaults by the other in the performance of any provisions of this agreement shall operate or be construed as a waiver of any future default or defaults, whether of a like or a different character.

(3) Except as herein otherwise provided, any notice, request, demand, statement or bill provided for in this agreement, or any notice which either party may desire

to give to the other, shall be in writing and shall be considered as duly delivered when mailed by registered mail to the Post Office address of either of the parties hereto, as the case may be, as follows:

BUYER: Natural Gas Pipeline Company of
America

122 So. Michigan Avenue
Chicago 3; Illinois

SELLER: TEXACO INC.

P. O. BOX 2420

TULSA, OKLAHOMA

or at such other address as either party shall designate by formal written notice. Routine communications, including monthly statements and payments, shall be considered as duly delivered when mailed by either registered or ordinary mail.

(4) The quantities of gas required to be delivered and received hereunder, as provided in Article II hereof, are computed with respect to the total gas reserves under the unitized area described in Exhibit "A" and Seller's obligations hereunder shall apply only to its undivided interest in such gas reserves.

ARTICLE XIX

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The parties contemplate that Seller requires a Certificate of Public Convenience and Necessity from the Federal Power Commission for the performance of the acts contemplated by the contract; and Seller agrees that it will, pursuant to the rules and regulations of the Federal Power Commission, file within sixty (60) days and prosecute with due diligence its application with the Federal Power Commission for a Certificate of Public Convenience and Necessity authorizing the performance [fol. 58] of all acts to be performed by it hereunder for which such authorization may be required. Seller shall have the right to refuse any Certificate issued to it on

the grounds that the terms and conditions attached to the issuance thereof or to the exercise of its rights granted thereunder are, in its sole discretion, unreasonable. Should for any reason Certificate be not issued to Seller and accepted by it, on or before August 1, 1962, either party may, by written notice to the other, cancel and terminate this contract at any time prior to consummation of such events.

IN WITNESS WHEREOF, the parties hereto have executed this instrument on the date first above written.

ATTEST:

NATURAL GAS PIPELINE
COMPANY OF AMERICA

Secretary

By -----
Executive Vice President

TEXACO INC.

By -----
Attorney-in-Fact

[fol. 59]

STATE OF OKLAHOMA)
COUNTY OF TULSA)

BEFORE ME, a Notary Public in and for said County and State, on this 2nd day of July, 1962, personally appeared O. F. Sebesta, Attorney-In-Fact of Texaco Inc., personally known to me to be such officer and to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Attorney-In-Fact, and he acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses, purposes and consideration therein set forth.

Given under my hand and seal of office the day and year first above written.

My Commission Expires:
April 28, 1964

/s/ J. F. BADGER
Notary Public in and for
Tulsa County, Oklahoma

STATE OF ILLINOIS)
COUNTY OF COOK)

BEFORE ME, a Notary Public in and for said County and State, on this 1st day of August, 1962, personally appeared M. V. Burlingame, Executive Vice President of Natural Gas Pipeline Company of America, personally known to me to be such officer and to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Executive Vice President, and he acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses, purposes and consideration therein set forth.

Given under my hand and seal of office the day and year first above written.

My Commission Expires:
February 2, 1963

/s/ [illegible]
Notary Public in and for
Cook County, State of Illinois

[fol. 60]

EXHIBIT "A"

ATTACHED TO AND MADE A PART OF GAS
PURCHASE AGREEMENT BETWEEN NATURAL
GAS PIPELINE COMPANY OF AMERICA AS BUYER
AND TEXACO INC. AS SELLER

DATED: MAY 1, 1962

LANDS IN UNIT AREA COVERED BY GAS
PURCHASE AGREEMENT

Township 1 N, Range 20 ECM, Beaver County, Okla-
homa

All of Section 1

DESCRIPTION OF LEASES:

Lease contributed by Cabot Corporation
Lease No. O-77.

Date:	December 21, 1951
Recorded:	Book 124, page 582, Records of the County Clerk, Beaver County, Okla- homa
Lessor:	Floyd A. Kerns and Nora Lee Kerns, his wife; Ivan I. Kerns and Bertha B. Kerns, his wife; Freda V. Kerns, a single woman and Henry H. Kerns, a single man
Lessee:	Cabot Carbon Company
Insofar as same covers:	The NW/4 of Section 1, Township 1 North, Range 20 ECM, Beaver County, Oklahoma

Lease contributed by Texaco Inc.

Date:	June 1, 1956.
Recorded:	Book 166, pages 287-290, Records of the County Clerk, Beaver County, Ok- lahoma

Lessor:

F. A. Kerns and wife, Nora Lee Kerns;
 Floyd R. Morgan and wife, Mildred
 Morgan; J. C. Morgan and wife, An-
 netta Morgan; Willie Sargent and wife,
 Retha B. Sargent; Wilson R. Morgan
 and wife, Una Morgan; Jesse Lile and
 wife, Vada B. Lile; Roy Sargeant and
 wife, Velva V. Sargent; John Cochran
 and wife, Marion V. Cochran; Calvin
 B. Morgan and wife, Loretta Morgan;
 Erma L. Morgan and wife, Fran Mor-
 gan

Lessee:

The Texas Company

Covering:

The SE/4 of Section 1, Township 1
 North, Range 20 ECM, Beaver County,
 Oklahoma

[fol. 61]

Lease contributed by Sun Oil Company

Date:

July 25, 1949

Recorded:

Book 29, OG, page 67, Records of the
 County Clerk, Beaver County, Okla-
 homa

Lessor:

Walter S. Mills, a single man

Lessee:

Sun Oil Company

Insofar as same
 covers:

The NE/4 of Section 1, Township 1
 North, Range 20 ECM, Beaver County,
 Oklahoma

Lease contributed by Kingwood Oil Company

Date:

February 2, 1951

Recorded:

Book 33 of OG, pages 342-344, Rec-
 ords of the County Clerk, Beaver
 County, Oklahoma

Lessor:

John W. Morgan, a widower

Lessee:

The Kingwood Oil Co.

Covering:

The N/2 of the SW/4 of Section 1,
 Township 1 North, Range 20 ECM,
 Beaver County, Oklahoma

Lease contributed by Cities Service Petroleum Company

Date: January 16, 1952
Recorded: Book 126, page 191, Records of the County Clerk, Beaver County, Oklahoma
Lessor: Loyd H. Willis and wife, Dorothy Willis, Pearl Aline Layton and husband, M. D. Layton
Original Lessee: Doyal I. Ely
Insofar as same covers: The S/2 of the SW/4 of Section 1, Township 1 North, Range 20 ECM, Beaver County, Oklahoma

INTERESTS OF THE PARTIES

Cabot Corporation	25.00625%
Texaco Inc.	24.99687%
Sun Oil Company	25.00000%
Kingwood Oil Company	12.49844%
Cities Service Petroleum Company	12.49844%

[fol. 62]

Address All Communications
To The Secretary

FEDERAL POWER COMMISSION

Washington 25, D.C.

Docket No. CI63-289
Texaco Inc.

Oct. 5, 1962

Texaco Inc.
P. O. Box 2332
Houston, Texas

AIRMAIL

Attention: W. V. Vietti, Manager, Gas Division

Gentlemen:

This is with reference to your letter of August 27, 1962, submitting for filing as a proposed rate schedule a contract dated May 1, 1962, between your company and Natural Gas Pipeline Company of America covering a proposed sale of natural gas from the Camrick Southeast Field, Beaver County, Oklahoma, together with a related certificate application in Docket No. CI63-289.

A review of the contract discloses that it contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. Therefore, in accordance with Commission Order No. 242, issued February 8, 1962, (copy enclosed) and Section 154.100 of the regulations, the proposed rate schedule and related certificate application are hereby rejected. All available copies are returned herewith. Such rejection is without prejudice to the submittal in conformity with the Commission's rules and regulations of three copies of the proposed rate schedule and one original and seven copies

of the related certificate application which do not contain the objectionable pricing provisions.

Very truly yours,

/s/ J. H. Gutride
Secretary

P. F. SCHLICHER, Attorney
Texaco Inc.
125 East 42nd Street
New York 17, New York

Enclosure No. 6557

cc: Natural Gas Pipeline
Company of America
122 South Michigan Avenue
Chicago 3, Illinois

O. F. Sebesta, Division
Manager
Texaco Inc.
P. O. Box 2420
Tulsa 2, Oklahoma

[fol. 63]

BEFORE THE FEDERAL POWER COMMISSION

Docket No. CI63-289

In the Matter of)
 TEXACO INC.)

APPLICATION FOR REHEARING OF COMMISSION ORDER OF
 OCTOBER 5, 1962 REJECTING FILINGS

Texaco Inc. (Texaco), pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, petitions the Commission for rehearing of its order of October 5, 1962 which rejected filings submitted by Texaco. Rehearing and reconsideration are requested on the following grounds:

I.

STATEMENT OF THE PROCEEDINGS

Under cover of its letter of August 27, 1962, Texaco submitted to the Commission an application for a certificate of public convenience and necessity, and a copy of a proposed rate schedule, including, *inter alia*, a copy of a contract dated May 1, 1962 with Natural Gas Pipeline Company of America (Natural). These documents were received by the Commission on September 4, 1962 and Texaco's application was docketed as No. CI63-289. The contract of May 1, 1962 provides for sales of natural gas over a period of twenty (20) years, and in Article X the contract provides for certain specific price increases at the beginning of the last three of the four five-year periods into which the contract term is divided. Article X also provides that Texaco and Natural will, during certain of these periods, undertake price renegotiation.¹

¹ Six months prior to the beginning of the third and fourth five-year periods, the renegotiated price will be determined on the average of the highest price (in existence without condition of

[fol. 64] With its application for a certificate of public convenience and necessity, Texaco also filed notice of its intention to commence sales under the May 1, 1962 contract pursuant to Section 157.28 of the Commission's Regulations under the Natural Gas Act and, pursuant to that Regulation, Texaco set forth the reasons for the need to commence immediate sales of gas produced from the properties committed to the contract, which properties are located in the Camrick Southeast Field, Beaver County, Oklahoma.

A letter dated October 5, 1962, and issued "in accordance with the Commission's Order No. 242, issued February 8, 1962," stated that "a review of the contract discloses that it contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's Regulations." The letter order went on to state, "The proposed rate schedule and related certificate application are hereby rejected."

II.

GROUND'S UPON WHICH RELIEF IS SOUGHT

The Commission order of October 5, 1962, and the therein sought implementation of the Commission's Order Nos. 242 and 232A is erroneous and illegal because:

A. The summary rejection, without notice of hearing of Texaco's application for a certificate of public convenience and necessity, is a violation of Section 7(c) of the Natural Gas Act.

B. The rejection is also violative of Sections 4 and 5 of the Act which prohibit summary proceedings.

C. The Commission's order of October 5, 1962, in the referenced docket, is not supported by substantial evi-

authorization) being paid by each of the three other interstate pipeline purchasers for purchases from fields wholly or partly within Texas and Beaver Counties, Oklahoma, adjusted if necessary " . . . to arrive at an adjusted price which will cover deliveries and receipt of gas under conditions comparable to those . . . to be made under the May 1, 1962 contract. The renegotiated price shall not be effective if it is less than the specified contract price applicable for that period.

dence and findings in the instant docket as required by Constitutional due process provisions, the Natural Gas Act and the Administrative Procedure Act.

D. The order of October 5, 1962 is unreasonable, arbitrary, capricious, and discriminatory as to Texaco in light of Texaco's rights under the Natural Gas Act and the [fol. 65] Commission's treatment of other natural gas companies.

E. The Commission's order of October 5, 1962, rejecting Texaco's application for a certificate of public convenience and necessity, and Texaco's proposed rate schedule, is unlawful because it is based on illegal regulations. The order of October 5, 1962 rejected Texaco's application and its rate schedule because the contract contained pricing provisions other than those directed by Section 154.93 of the Commission's Regulations and because, under Section 154.100 of the Commission's Regulations (and its Order No. 242), any contracts executed on or after April 2, 1962 containing other than the permitted-price provisions are to be rejected.

The portions of the Commission's Regulations relied upon for the rejection of Texaco's filings were adopted as the result of separate orders of the Commission issued without any evidentiary hearing regarding the necessity, propriety or lawfulness of such regulations. The orders initiating the changes in Regulations were entered over the written protests of Texaco and other producers, both before the Commission and before the courts.

The orders and the regulations promulgated in accordance with Order Nos. 242 and 232A, relied upon by the Commission, and enforced by the order of October 5, 1962, are themselves unlawful for each of the following reasons:

(1) They exceed the authority delegated to the Commission under the terms of the Natural Gas Act in that they are neither necessary nor appropriate to the administration of the Act.

(2) These regulations totally circumvent the statutory scheme set forth by Congress in the Natural Gas Act and recognized by the Supreme Court in its decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co. v. Memphis*

Gas, Light & Water Division, 358 U.S. 103 (1958). They deprive Texaco and its purchaser of the statutory and Constitutional right to establish the terms, provisions and conditions under which natural gas is to be sold in interstate commerce for resale, subject only to the review powers granted the Commission.

[fol. 66] (3) Order Nos. 242 and 232A are in direct violation of the Natural Gas Act itself in that Sections 4, 5 and 7 of the Natural Gas Act provide the standards under which rate filings are to be reviewed and certificate applications are to be considered.

(4) They are violative of the provisions of Sections 5 and 7 of the Administrative Procedure Act.

(5) They are in violation of the Fifth Amendment to the Constitution of the United States in that they deprive Texaco of due process of law.

(6) They are unreasonable, arbitrary and capricious.

(7) They are discriminatory and arbitrary, and therefore unlawful, in that their application will, as in this case, permit other sellers of gas from the same field to have and employ pricing provisions which have herein been denied to Texaco.

(8) They are arbitrary and capricious in that they are discriminatory against Texaco in the light of regulations permitting indefinite price filings by other natural gas companies.

(9) They amount to a prejudgment of the lawfulness of the rates which might be filed in the future and preclude such filing and the right to test the lawfulness thereof.

WHEREFORE, Texaco Inc. respectfully requests that this Commission desist from the application of its unlawful regulations to Texaco, modify its letter order of October 5, 1962, and allow Texaco to file its rate schedule and application for a certificate.

Respectfully submitted:

**TEXACO INC.
ALFRED C. DECRANE, JR.
JAMES J. FLOOD, JR.
P. O. Box 2332
Houston 1, Texas**

**By Signed: Alfred C. DeCrane, Jr.
ALFRED C. DECRANE, JR.
Attorney for Texaco Inc.**

[fol. 67] * * *

[fol. 68]

**UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION**

Before Commissioners:

Joseph C. Swidler, Chairman; Howard Morgan, L. J.
O'Connor, Jr., Charles R. Ross and Harold C. Wood-
ward.

Texaco Inc.

Docket No. CI63-289

ORDER DENYING REHEARING—Issued November 30, 1962

Texaco Inc. (Texaco), under cover of its letter of August 27, 1962 submitted to the Commission an application for a certificate of public convenience and necessity, and a copy of a proposed rate schedule, including a copy of a contract dated May 1, 1962 with Natural Gas Pipeline Company of America.

The Commission by letter order dated October 5, 1962, rejected Texaco's proposed rate schedule and related certificate application on the grounds that contract contained pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. This action was consistent with the Commission's Order No. 242, issued on February 8, 1962.

On November 1, 1962, Texaco filed an Application for Rehearing of the above-mentioned Commission Order of October 5, 1962. Texaco therein generally alleges that the Commission's regulations promulgated in accordance with Order Nos. 242 and 232A are unlawful on numerous grounds including, *inter alia*, the fact that the Commission exceeded the authority delegated to it under the Natural Gas Act in amending its Regulations in accordance with these orders. Texaco also alleges that the Commission's rejection of its application in Docket No. CI63-289 and related rate schedule was tantamount to a summary rejection and therefore unlawful under the provisions of the Natural Gas Act.

In its application for rehearing Texaco attacks primarily the validity of Orders Nos. 242 and 232A, pursuant to

which the action rejecting the filing in Docket No. CI63-289 was taken.

[fol. 69] Notices of Proposed Rule Making were issued by the Commission in Docket No. R-153 on April 4, 1956 and in Docket No. R-203 on October 10, 1961. The latter proceedings culminated in Order Nos. 232A and 242, respectively. All interested parties were afforded the opportunity to file appropriate written comments on these proposed rules. After giving careful consideration to the responses filed in Docket Nos. R-153 and R-203, the Commission was of the view that Order Nos. 232A and 242 and the regulation promulgated thereby were essential to the appropriate administration of the Natural Gas Act. The Commission therefore reaffirms the propriety of these orders and the action taken thereunder in connection with Texaco's proposed rate schedule and related application filed in Docket No. CI63-289.

The Commission Orders:

That the application for Rehearing filed by Texaco Inc. in Docket No. CI63-289 be and hereby is denied.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

[Clerk's Certificate omitted in printing]

[fol. 70]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Title Omitted]

[File Endorsement Omitted]

RESPONDENT'S ANSWER TO MOTION FOR CONSOLIDATION
FOR PURPOSES OF ORAL ARGUMENT, ETC.

AND

RESPONDENT'S MOTION TO DISMISS FOR LACK OF PROPER
VENUE—Filed December 14, 1962

Respondent Federal Power Commission requests that action on petitioner's motion be postponed. While we intend to cooperate with petitioner to have No. 7217 ready for argument at the March session of this Court when *Pan American Petroleum Corporation v. F.P.C.*, No. 7002, now consolidated with *Sun Oil Co. v. F.P.C.*, No. 7179, will be ready for argument, we believe it premature to decide prior to the filing of the briefs whether argument on Texaco's petition for review in No. 7271 should be consolidated for argument or merely heard at the same time.

With respect to petitioner's other procedural suggestions, we have no objection to its reliance on the statement of facts in its Petition for Review and to its use of Pan American's initial brief in No. 7002 as its own initial brief or to the filing of a reply brief after our brief is filed.

As petitioner anticipated, we believe that its petition in No. 7217 should be dismissed for lack of proper venue and we hereby formally raise that objection. For the reasons [fol. 71] fully set forth in our motion to dismiss No. 7135, pp. 8-13, we believe that Texaco is not "located" within this Circuit though that is the criterion on which it bases its claim to venue under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). Since disposition of the same issue raised by separate motions to dismiss in *Texaco Inc. v. F.P.C.*, Nos. 6947 and 7135, now pending, has been post-

poned until after hearing on the merits, we suggest that our present motion to dismiss for venue be similarly deferred until a hearing on the merits. In making substantially the same suggestion petitioner proposes that an order be entered that "any question of the propriety of venue in these matters" should be governed by the ruling in Nos. 6947 and 7135. We object to this proposed language because it is inadequate to achieve the objective inasmuch as the Court might choose to dismiss those earlier petitions for lack of jurisdiction without reaching the venue objection, an alternative not available here.

Respectfully submitted,

/s/ Howard E. Wahrenbrock
HOWARD E. WAHRENBROCK
Solicitor

/s/ Peter H. Schiff
PETER H. SCHIFF
Attorney

December 12, 1962
Federal Power Commission
Washington 25, D. C.

[fol. 72]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 78]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 7303

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

vs.

FEDERAL POWER COMMISSION, RESPONDENT

**PETITION FOR REVIEW OF ORDERS OF THE FEDERAL
POWER COMMISSION**

MOTION FOR ORDER CONSOLIDATING CASES

**MOTION FOR ORDER REQUIRING IMMEDIATE CERTIFICATION
OF RECORD—FILED MARCH 8, 1963**

**To: The Honorable, the Chief Judge and Judges of the
United States Court of Appeals for the Tenth Circuit:**

**Pan American Petroleum Corporation (Petitioner)
hereby petitions this Honorable Court for review of Fed-
eral Power Commission (Respondent, Commission) Order
No. 242 issued February 8, 1962, as subsequently form-
ally executed by issuance of the Commission February
19, 1963. Letter Order in Docket No. CI63-867, and
respectfully moves the Court for an order consolidating
this case with Case No. 7002 pending in this Court and
requiring immediate certification of the record.**

**This petition for review is filed pursuant to the pro-
visions of Section 19(b) of the Natural Gas Act (Act)
(52 Stat. 831), 15 U.S.C. § 717r(b); and Rule 34 of the
Rules of this Court.**

[fol. 74]

STATEMENT OF THE CASE

**By notice issued April 4, 1956, in Docket No. R-153, the
Commission proposed issuance of an order providing**

that, after July 1, 1956, all independent producer gas sales contracts containing certain "indefinite" change in price provisions will not be accepted for filing under Section 4 of the Natural Gas Act. Petitioner, then Stanolind Oil and Gas Company, on June 1, 1956, filed its letter dated May 24, 1956, opposing issuance of the proposed rule. Thereafter, the Commission, on March 3, 1961, issued its Order No. 232, providing that "indefinite" change in price provisions in all independent producer contracts *tendered for filing on and after April 3, 1961, shall be inoperative and of no effect at law.* On March 20, 1961, and pursuant to ordering paragraph (B) of Order No. 232, Petitioner filed with the Commission its views and comments in opposition to Order No. 232. Subsequently, on March 28, 1961, Petitioner filed its application for rehearing upon Order No. 232.

On March 31, 1961, the Commission issued its Order No. 232-A modifying its Order No. 232 to provide that "indefinite" change in price provisions in all independent producer contracts *executed on or after April 3, 1961, shall be inoperative and of no effect at law.* On April 26, 1961, Petitioner filed its application for rehearing upon Commission Order No. 232-A. In each of the foregoing applications for rehearing, Petitioner contended that Orders Nos. 232 and 232-A are invalid and unlawful in particulars, *inter alia*, hereinafter stated as grounds upon which relief is requested in this case. By Letter Orders issued May 4, 1961, and May 5, 1961, the Commission rejected Petitioner's applications for rehearing upon the ground that "application for rehearing [upon these orders] does not lie under Section 19 of the Natural Gas Act."

Thereafter, by Notice of Proposed Rulemaking, issued on October 10, 1961, in Docket No. R-203, the Commission proposed the issuance of an order providing for *rejection of all rate schedules and applications for certificates of public convenience and necessity filed by independent producers* which are supported by contracts which contain "indefinite" change in price provisions [fol. 75] that the Commission declared to be "inoperative and of no effect at law" in its Order No. 232-A, and also providing that such independent producer contracts shall

not, upon applications for certificates of public convenience and necessity by interstate pipe lines, be considered in support of the applicant's gas supply. Petitioner filed extensive views and comments in which it argued that the proposed order would be even more unlawful and in excess of the Commission's authority than Order No. 232, as modified by Order No. 232-A.

Subsequently, on February 8, 1962, the Commission issued its Order No. 242, in Docket No. R-203, Appendix pp. 1a-2a, in which it ordered *rejection of producer rate schedules and applications for certificates of public convenience and necessity which are supported by contracts executed on or after April 2, 1962, that contain "indefinite" change in price provisions which Order No. 232-A, declares to be invalid and of no effect at law*, and also provided that *such contracts filed in support of interstate pipe line company certificate applications will be given no consideration in determining the adequacy of the pipe line company's gas supply*. Thereafter, on March 7, 1962, Petitioner filed its application for rehearing upon Order No. 242, stating that in the particulars, *inter alia*, as hereinafter set forth as the ground upon which relief is requested in this case, Order No. 242 is unlawful and invalid.

On April 4, 1962, the Commission issued its order denying Petitioner's application for rehearing. Subsequently, Petitioner duly filed in this Court a Petition for review of Order No. 242. Such review is pending in *Pan American Petroleum Corp. v. FPC*, Case No. 7002.

Under the date October 4, 1962, Petitioner and Colorado Interstate Gas Company (Colorado Interstate) entered into a contract for the sale of gas from Petitioner's reserves in the Beaver Creek Field, Fremont County, Wyoming. Paragraph 5.1 of such contract provides that the price for the gas is 17.5¢ per Mcf through September 30, 1968, 18.5¢ per Mcf during the period October 1, 1968, through September 30, 1973, 19.5¢ per Mcf during the period October 1, 1973, through September 30, 1978, and 20.5¢ per Mcf during the period October 1, 1978, through September 30, 1983, Appendix pg. 7a. This [fol. 76] contract price changing provision constitutes a so-called "definite price changing clause." Paragraph 5.1

of the contract further provides that, commencing October 1, 1983, the contract price for each five-year period shall be the fair market price determined and negotiated by the purchaser and seller at the beginning of each such five-year period, Appendix pp. 7a-8a. This latter contract price changing provision constitutes a so-called "indefinite or flexible price changing clause."

On or about January 16, 1963, Petitioner filed with the Commission under Section 7(c) of the Act, 115 USC § 717f(c), its application for a certificate of public convenience and necessity covering such sale of gas. By Letter Order issued February 19, 1963, in Docket No. CI63-867, Appendix pg. 9a, the Commission rejected and returned to Petitioner, Petitioner's certificate application. As its basis for such action, the Commission stated that, because Petitioner's October 4, 1962, contract contains price changing provisions which violate Order No. 232-A, Order No. 242 requires that the certificate application be rejected. The sections of the Commission's Regulations constituting Orders Nos. 232-A and 242 and referred to in the February 19, 1963, Letter Order are reproduced in the Appendix, pg. 1a.

On March 4, 1963, Petitioner filed its petition for review in *Pan American Petroleum Corp. v. FPC*, Case No. 7300 in this Court. On the same date petitioner filed with Respondent a further application for rehearing upon Order No. 242, making reference to the February 19, 1963, Letter Order execution thereof, Appendix pp. 11a-18a. By order issued March 6, 1963, Appendix pp. 19a-20a, Respondent denied Petitioner's application for rehearing.

Petitioner desires that this case be consolidated for argument on March 18, 1963, with Case No. 7002, and hereby adopts as its briefs in this case the briefs filed by Petitioner in Case No. 7002.

VENUE

Section 19 (b) of the Act provides that petitions for review of Commission orders may be filed in the United States Court of Appeals for any circuit wherein the petitioner is [fol. 77] located or has its principal place of business. Pe-

itioner is located and has its principal place of business at 511 South Boston Avenue, Tulsa, Oklahoma.

JURISDICTIONAL STATEMENT

As Respondent recognizes in its briefs in *Pan American Petroleum Corp. v. FPC*, Case No. 7002, and *Texaco Inc. v. FPC*, Case No. 7217 in this Court, and in its February 19, 1963, Letter Order, the substantive decision which is the issue on review in the instant case is the substantive decision made by the Commission when it issued Order No. 242. The February 19, 1963, Letter Order is merely ministerial execution of such substantive decision. Court decision that Order No. 242 is invalid as being out of harmony with the Act would mean that Order No. 242 is a mere nullity and the February 19, 1963, ministerial execution thereof is also a nullity. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129 (1936).

In its briefs in support of its Motion to Dismiss in Case No. 7002, Respondent argues that such ministerial executions of Order No. 242 make Order No. 242 aggrieve Petitioner so as to entitle Petitioner to judicial review of Order No. 242. Even under Respondent's conception of parties aggrieved, Petitioner is a party sufficiently aggrieved by the issuance of Order No. 242 as to be entitled to prompt judicial review thereof.

On March 7, 1962, Petitioner applied for rehearing upon Order No. 242 (Case No. 7002, R. 290-318), and by order issued April 4, 1962, Respondent denied Petitioner's application for rehearing (Case No. 7002, R. 388-389). On March 4, 1963 Petitioner filed a further application for rehearing upon Order No. 242, making reference to the February 19, 1963, ministerial execution thereof, Appendix pp. 11a-18a. By Order issued March 6, 1963, Appendix pp. 19a-20a, Respondent denied such application for rehearing.

GROUND S UPON WHICH RELIEF IS SOUGHT

1. Petitioner submits that Respondent's Order No. 242, executed against Petitioner's contract on February 19, [fol. 78] 1963, in Docket No. CI63-867, is erroneous, invalid, and unlawful in the following particulars:

a. *Order No. 242 regulates matters which are outside the scope of Respondent's regulatory authority.*

(1) The formulation by natural gas companies of contract pricing provisions is outside the scope of the Act, and, therefore, outside the scope of the regulatory authority delegated to Respondent under the Act. Cf. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, et al.*, 358 U.S. 103 (1958).

(2) Section 16 of the Act, 15 U.S.C. § 717o, does not authorize Respondent to issue orders regulating matters which are outside the scope of its delegated regulatory authority. *FPC v. Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949); *Willmut Gas & Oil Co. v. FPC*, 294 F. 2d 245 (D.C. Cir. 1961); and Section 9(a) of the Administrative Procedure Act, 5 U.S.C. § 1008(a).

(3) Order No. 242 constitutes formal substantive regulation of the formulation of contract price changing provisions, and is, therefore, in excess of Respondent's regulatory authority and unlawful.

b. *Order No. 242 violates Sections 4, 5 and 7 of the Act, 15 U.S.C. § 717c, d & f, Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004 & 1006, and Amendment V of the Constitution.*

(1) Sections 4, 5 and 7 of the Act provide that contract rates may be disallowed and certificate applications denied only after hearings and findings that the specific rates or the specific gas sales proposed are not consistent with the regulatory standards prescribed in such statutory provisions. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water*

Division, et al., Supra, and Atlantic Refining Co. v. Public Service Comm'n., 360 U.S. 378 (1959).

(2) Order No. 242 operates to disallow contract rates and reject certificate applications without such [fol. 79] required statutory hearings and findings.

(3) Section 16 of the Act does not authorize nullification or avoidance of such statutory requirements. *Mississippi River Fuel Corp. v. FPC*, 202 F. 2d 899 (3rd Cir. 1953); *The Pure Oil Co. v. FPC*, 292 F. 2d 350 (7th Cir. 1961); *Phillips Petroleum Co. v. FPC*, 258 F. 2d 906 (10th Cir. 1958); and Administrative Procedure Act, Sections 5 and 7.

c. *The issuance of Order No. 242 is not supported by facts or findings of facts.*

d. *Order No. 242 and the February 19, 1963, enforcement thereof against Petitioner's contract are unduly discriminatory, unreasonable, arbitrary and capricious.*

(1) There is no reasonable basis for Respondent's conclusion that flexible forward pricing is necessary and proper with respect to Colorado Interstate but unnecessary and improper with respect to Petitioner.

(2) There is no reasonable basis for Respondent's supposition that its regulatory difficulties are traceable to flexible forward pricing in producer sales instead of Respondent's failure to establish regulatory criteria applicable to adjudications of the reasonableness of Petitioner's rates in the same manner as Respondent has established criteria applicable to adjudications of the reasonableness of Colorado Interstate's rates.

(3) There is no reasonable relation between the pricing clauses in Petitioner's contract, Appendix pp. 7a-8a, and the suppositions and conclusions recited in Order No. 242 (Case No. 7002, R. 277-279).

2. Petitioner submits that this case should be consolidated with Case No. 7002 for oral argument before the Court on March 18, 1963.

a. Petitioner adopts as its briefs in this case, its briefs in Case No. 7002. The issue under review in each case is whether Order No. 242 is invalid.

[fol. 80] b. Prompt judicial review of Order No. 242 is necessary to avoid further disruption of Petitioner's business operations and to reduce the confusion and uncertainty respecting Respondent's regulation of Petitioner's rates.

c. Such consolidation for oral argument will save time and expense of the Court and the parties.

3. Petitioner submits that the Court should order immediate certification of the record.

a. Based upon Respondent's determination of the record in *Pan American Petroleum Corp. v. FPC*, Case No. 6973 pending in this Court, Petitioner submits that the record in the instant case consists of two instruments:

- (1) Petitioner's application for certificate of public convenience and necessity and exhibits, and
- (2) Respondent's February 19, 1963, Letter Order in Docket No. CI63-867.

The portions of such instruments that Petitioner designates for printing are reproduced in the Appendix, pp. 3a-10a. Petitioner's March 4, 1963 application for rehearing and Respondent's March 6, 1963 order denying application for rehearing are printed, Appendix pp. 11a-20a.

b. Petitioner respectfully requests that neither the filing of this Petition for Review nor delays in certification of the record in this case result in postponement of oral argument in Cases Nos. 6973 and 7002 docketed for March 18, 1963, but that these cases be argued on March 18, 1963, regardless.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for review of Respondent's Order No. 242 with reference to execution thereof against Petitioner's contract by Letter Order issued February 19, 1963, and that the Court enter an order consolidating this case for argument on March 18, 1963, with Case No. 7002 and requiring Respondent to immediately certify and file the record, and, further, that [fol. 81] upon review by the Court, the Court enter an

order directing Respondent to vacate and set aside its
Order No. 242.

Respectfully submitted,

J. P. HAMMOND
WILLIAM H. EMERSON
P. O. Box 591
Tulsa 2, Oklahoma

THOMAS J. FILES
P. O. Box 40
Casper, Wyoming

WILLIAM J. GROVE
CARROLL L. GILLIAM
600 Munsey Building
Washington 4, D. C.

Attorneys for Petitioner

PAN AMERICAN PETROLEUM CORPORATION

OF COUNSEL:

DOW, LOHNES AND ALBERTSON
600 Munsey Building
Washington 4, D. C.

March 7, 1963

[fol. 82]

RECORD BEFORE FEDERAL POWER COMMISSION

Pan American Contract No. 49,928
Beaver Creek Field
Fremont County
WYOMING

BEFORE THE FEDERAL POWER COMMISSION

Docket No.

In the Matter of the Application under the Natural Gas
Act of Pan American Petroleum Corporation for a Cer-
tificate of Public Convenience and Necessity.

APPLICATION

Applicant states:

1. That Applicant's exact legal name is Pan American Petroleum Corporation.
2. That Applicant is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at 511 South Boston Avenue, Tulsa 3, Oklahoma.
3. That Applicant is authorized to do business in the States of Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah and Wyoming.
4. That orders, correspondence and communications regarding this Application are to be addressed to the following:

Joe P. Hammond, General Attorney
Pan American Petroleum Corporation
Post Office Box 591
Tulsa 2, Oklahoma

Harold H. Young, Jr., Attorney
Pan American Petroleum Corporation
Post Office Box 40
Casper, Wyoming

[fol. 83] and,

William J. Grove, Esq.
Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

5. That the proposed sale and the pertinent facts with respect thereto are as follows:

a) Applicant proposes to sell natural gas to Colorado Interstate Gas Company under and in accordance with the terms and conditions of a Gas Sales Contract, dated October 4, 1962, as amended, between Applicant, as Seller, and Colorado Interstate Gas Company, as Buyer, in the quantities specified in said Contract. A true and correct copy of said Gas Sales Contract which sets forth the terms and conditions of the proposed sale is attached hereto, marked Exhibit "B" and made a part hereof. A true and correct copy of an Amendment to said Contract, dated November 28, 1962, between the parties to said Contract, is attached hereto, marked Exhibit "B-1," and made a part hereof.

As required by Section 157.24(a) (5) of the Commission's regulations, a summary of a few of the provisions of said contract, on the form prescribed in Section 250.5 of the Commission's regulations, is attached hereto, marked Exhibit "C" and made a part hereof.

b) The source of the gas sold pursuant to the terms of the above contract is Applicant's share of gas produced from or attributed to the acreage in the Beaver Creek Field, Fremont County, Wyoming, described in Exhibit "B" to the said Gas Contract, insofar as such gas originates from the Phosphoria Formation underlying such lands, to the extent specifically covered by said contract as now written or as subsequently amended by mutual agreement of the parties thereto.

c) The gas involved herein will be delivered at a mutually agreeable point at the discharge side of Applicant's

processing plant located in the field where the gas was produced.

[fol. 84] d) The sale of natural gas involved herein will not be accomplished by means of a pipe line or pipe lines.

e) Applicant did not on June 7, 1954, and does not now, serve any communities at wholesale or retail.

f) Applicant did not on June 7, 1954, and does not now, serve any main line industrial customers.

g) Applicant's major appurtenant properties and facilities are as follows: dehydrators or line heaters, lease separation facilities, and the processing plant located in the field.

6. That attached hereto, marked Exhibit "A" and made by reference a part hereof, is a key map of the facilities of Applicant which will be in use in connection with the production and gathering of the gas covered hereby. The facilities shown on said map are production and gathering facilities. The inclusion of the same shall be deemed to be merely for the purpose of complying with the regulations of the Commission, and not for the purpose of requesting a Certificate of Public Convenience and Necessity therefor.

7. That this Application covers only the sale of Applicant's share of gas made under and pursuant to the terms of the Gas Sales Contract and Amendment thereto referred to in paragraph 5 (a) hereof, as subsequently amended by mutual agreement of the parties, and then only to the extent, if any, that such sale may be held to be a sale in interstate commerce for resale, and this Application is specifically limited to such sale.

8. That this Application shall not be deemed to involve a request for a Certificate of Public Convenience and Necessity broader in scope than the prayer hereof.

9. That all facilities maintained and operated by Applicant in connection with the gas covered hereby are production or gathering facilities, and said facilities and the operations performed thereby or in connection herewith are exempt from regulation by the Commission under the Natural Gas Act.

[fol. 85] WHEREFORE, Applicant prays that the Commission issue to Applicant a Certificate of Public Convenience and Necessity authorizing Applicant to sell natural gas, under and in accordance with the terms and conditions of the sales contract and amendment referred to in paragraph 5 (a) hereof as now written or as subsequently amended by mutual agreement of the parties thereto.

Signed at Casper, Wyoming, this 14th day of January, 1963.

PAN AMERICAN PETROLEUM CORPORATION

By /s/ Harold H. Young, Jr.

Its Attorney
Post Office Box 40
Casper, Wyoming

[fol. 86]

Form CIG 85
(Revised 10-1-58)

EXHIBIT "B" TO APPLICATION

CONTRACT NO. 256-A

GAS PURCHASE AGREEMENT

between

Colorado Interstate Gas Company,
Buyer,

and

Pan American Petroleum Corporation,
Seller.

Dated October 4, 1962

WYOMING—WIND RIVER BASIN
BEAVER CREEK FIELD

(Phosphoria Formation Only)

ARTICLE V—PRICE

5.1 *Price*—For all gas delivered to Buyer by Seller hereunder the price per Mcf shall be as follows:

- (a) For the period commencing with the effective date hereof and continuing thereafter through September 30, 1968 17.5¢
- (b) For the period commencing with October 1, 1968, and continuing thereafter through September 30, 1972 18.5¢
- (c) For the period commencing with October 1, 1973, and continuing thereafter through September 30, 1978 19.5¢
- (d) For the period commencing with October 1, 1978, and continuing thereafter through September 30, 1983 20.5¢

- (e) For each five-year period after that specified in (d) above, the price for the sale of gas hereunder shall be the fair market price established as of the beginning of each such period but in no event shall be less than 20.5¢. Representatives of each of the parties hereto shall meet for the purpose of establishing such fair market price six months prior to the end of the five-year period specified in (d) above and six months prior to the end of each five-year period thereafter during the term hereof. In the establishment of the fair market price for the sale of gas hereunder, the parties shall consider along with other relevant factors, quality, quantity, delivery pressure and delivery point, and the prices other major pipeline companies are paying for gas in the general area under agreements which at that time have been recently negotiated or renegotiated.

In the event the parties hereto fail to agree as to the price prior to the beginning of any price period after that specified in (d) above, Seller shall continue to deliver gas hereunder and Buyer shall continue to pay Seller a price equal to the price in effect prior to the beginning of such period or 20.5¢, whichever is the greater, during the period of time the price remains in dispute, subject to retroactive adjustment based on the price when subsequently established.

ARTICLE VI—TERM

6.1 This Agreement shall become effective on date hereof, and shall remain in full force for a term of 20 years and so long thereafter as gas is capable of being produced in commercial quantities from the oil and gas leases and gas rights committed to the performance of this Agreement.

[fol. 88]

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Docket No. CI63-867
Pan American Petroleum Corporation

February 19, 1963

Pan American Petroleum Corporation
P. O. Box 40
Casper, Wyoming

Attention: Mr. Harold H. Young, Jr.

Gentlemen:

This is with reference to your letter of January 14, 1963, submitting an application for certificate of public convenience and necessity, assigned Docket No. CI63-867, for proposed sales of gas to Colorado Interstate Gas Company from the Beaver Creek Field (Phosphoria Formation), Fremont County, Wyoming.

The sales are proposed to be made pursuant to a contract dated October 4, 1962, attached as an exhibit to your certificate application. The contract incorporates pricing provisions other than those permitted by Section 154.93 of the Commission's Regulations. Therefore, in accordance with Sections 154.93 and 154.100 of the Regulations, your certificate application and exhibits thereto are hereby rejected. All available copies are returned herewith.

This rejection is without prejudice to the resubmittal of an original and seven copies of your application and ex-

hibits thereto which do not contain the unacceptable pricing provisions.

Very truly yours,

/s/ J. H. Gutridge
Secretary

[fol. 89] Enclosure No. 1226

cc: Colorado Interstate Gas Company
P. O. Box 1087
Colorado Springs, Colorado

Joe P. Hammond, General Attorney
Pan American Petroleum Corporation
P. O. Box 591
Tulsa 2, Oklahoma

William J. Grove, Esq.
Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

[fol. 90]

Before the
FEDERAL POWER COMMISSION

Docket No. CI63-867

In the Matter of
PAN AMERICAN PETROLEUM CORPORATION

APPLICATION FOR REHEARING

Pursuant to Section 19(a) of the Natural Gas Act (Act), 58 Stat. 831, 15 U.S.C. § 717r(a), Pan American Petroleum Corporation (Pan American) hereby applies for rehearing upon Order No. 242 issued on February 8, 1962, and the enforcement thereof, by Letter Order issued February 19, 1963, in Docket No. CI63-867, respecting Pan American's October 4, 1962, contract with Colorado Interstate Gas Company.

STATEMENT OF ERRORS

The issuance of Order No. 242 and the February 19, 1963, application thereof to Pan American's October 4, 1962, contract constitute Federal Power Commission (Commission) action that is not authorized by the Act, and that violates the Constitution and laws of the United States:

1. The purported standards, "adverse to the public interest" and "making the tasks of regulation more manageable," are not regulatory standards prescribed in Sections 4, 5 or 7 of the Act, or standards under which the Commission can deprive Pan American of its contract rights and contract rates.

2. Order No. 242 and its February 19, 1963, enforcement against Pan American's contract deprive Pan American of its rights under procedural due process of law

and substantive due process of law. Such orders and the procedure under which they were issued violate the Natural Gas Act and Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004 and 1006, and Amendment V to the Constitution of the United States.

[fol. 91] 3. The Commission does not have authority under Section 16 of the Act to prohibit Pan American from filing gas sales proposals and rate change proposals with the Commission for hearing and determination as to whether such sales and rates satisfy the regulatory standards prescribed in Sections 4 and 7 of the Act.

4. The Commission does not have authority under Section 16 of the Act to make, without hearings and findings, the substantive rate regulatory adjudications and decisions that, under Sections 4, 5, and 7 of the Act, must be made upon notice, findings and hearings.

5. By its Order No. 242 and February 19, 1963, Letter Order, the Commission deprives Pan American of the hearings and findings upon which it is entitled under Sections 4, 5, and 7 of the Act to have regulatory adjudications made respecting its contract rates.

6. Order No. 242 is discriminatory and is not supported by facts and findings of fact and conclusions of law showing that such discrimination is lawful or permitted under the regulatory standards prescribed by the Act.

7. Order No. 242 is not supported by findings of subsidiary and ultimate facts showing that summary rejection of certificate applications supported by contracts containing flexible pricing clauses is either necessary or proper to carry out the provisions of Sections 4, 5, or 7 of the Act.

8. Order No. 242 is neither necessary nor appropriate to carry out the provisions of the Act, and is unjust and unreasonable, arbitrary and capricious.

STATEMENT OF THE CASE

By Order No. 232, issued March 3, 1961, in Docket No. R-153, as amended by Order No. 232-A, issued March 31, 1961, the Commission entered a substantive rate regulatory decision that so-called "indefinite price changing

clauses" in new producer gas sales contracts are void under Sections 4, 5, and 7 of the Act.

Pan American duly filed applications for rehearing upon Orders Nos. 232 and 232-A. By Letter Order [fol. 92] issued May 4, 1961, the Commission rejected Pan American's application for rehearing upon Order No. 232, and by Letter Order issued May 5, 1961, it rejected Pan American's application for rehearing upon Order No. 232-A.

By Notice of Proposed Rulemaking issued October 10, 1961, in Docket No. R-203, the Commission gave notice of its proposal to issue an order to reject certificate applications supported by contracts containing "indefinite price changing clauses," and invited data, views, and comments upon such proposal. Pan American duly filed its data, views, and comments in Docket No. R-203. On February 8, 1962, the Commission issued its Order No. 242 in Docket No. R-203.

On March 7, 1962, Pan American filed its application for rehearing upon Order No. 242. By Order issued April 4, 1962, the Commission denied Pan American's application for rehearing. Thereupon, Pan American filed a Petition for Review in the Court of Appeals for the Tenth Circuit, in *Pan American Petroleum Corp. v. FPC*, Case No. 7002.

Under the date of October 4, 1962, Pan American and Colorado Interstate Gas Company (Colorado Interstate) entered into a contract for the sale of gas from Pan American's reserves in the Beaver Creek Field, Fremont County, Wyoming. On or about January 16, 1963, Pan American duly filed with the Commission under Section 7(c) of the Act an application for a certificate of public convenience and necessity covering such sale of gas.

Paragraph 5.1 of such contract provides that the price for the gas is 17.5¢ per Mcf through September 30, 1968, 18.5¢ per Mcf during the period October 1, 1968, through September 30, 1973, 19.5¢ per Mcf during the period October 1, 1973, through September 30, 1978, and 20.5¢ per Mcf during the period October 1, 1978, through September 30, 1983. This contract price changing provision

constitutes a so-called "definite price changing clause." Paragraph 5.1 of the contract further provides that, commencing October 1, 1963, the contract price for each five-year period shall be the fair market price determined and negotiated by the purchaser and seller at the beginning [fol. 93] of each such five-year period. This latter contract price changing provision constitutes a so-called "indefinite or flexible price changing clause." By Letter Order issued February 19, 1963, in Docket No. CI63-867, the Commission rejected and returned to Pan American, Pan American's certificate application. As its basis for such action, the commission stated that, because Pan American's October 4, 1962, contract contains a price changing provision which violates Order No. 232-A, Order No. 242 requires that the certificate application be rejected.

PAN AMERICAN IS AGGRIEVED

In its Motion to Dismiss in *Pan American Petroleum Corp. v. FPC*, Case No. 7002, Court of Appeals, Tenth Circuit, and in its briefs in support thereof, the Commission states that the issuance of letter orders, such as the February 19, 1963, Letter Order in Docket No. CI63-867, rejecting Pan American's certificate application, aggrieves Pan American so as to entitle it to review of Order No. 242.

STATEMENT IN SUPPORT OF APPLICATION FOR REHEARING

Section 9(a) of the Administrative Procedure Act, 5 U.S.C. § 1008 (a), provides that:

"In the exercise of any power or authority—

"(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

This statutory provision and the decisions of the Courts in *FPC v. Panhandle Eastern Pipe Line Co., et al.* 337 U.S. 498 (1949), and *Willmut Gas & Oil Co. v. FPC*, 294

F. 2d 245 (D. C. Cir. 1961), show that the power of the Commission to administer the Act and prescribe rules and regulations to that end is not ~~the power to make law~~—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the scheme of rate regulation adopted by Congress in the Act. Regulation which does not do this but operates to create [fol. 94] a rule out of harmony with the Act or invades a subject over which the Commission is not delegated regulatory jurisdiction by the Act is void and a mere nullity. Order No. 242, as applied on February 19, 1963, to Pan American's October 4, 1962, contract is both inconsistent with the Act and arbitrary, capricious, and unreasonable. Section 16 of the Act clearly does not give the Commission authority to restrict or enlarge the scope of the Act or deprive Pan American of the free exercise of rights which are reserved to it free from regulation under Sections 4, 5 and 7 of the Act.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), the Court held that regulation of natural gas company formulation of contract price changing clauses is not within the scope of the limited authority delegated to the Commission under the Act. This rule has been recognized and followed in numerous decisions of the United States Court of Appeals, among which are *Cities Service Gas Co. v. FPC*, 255 F. 2d 860 (10th Cir. 1958); *Phillips Petroleum Co. v. FPC*, 253 F. 2d 906 (10th Cir. 1958); and *Willmut Gas & Oil Co. v. FPC*, 294 F. 2d 245 (D. C. Cir. 1961).

Sections 4 and 5 of the Act provide that the Commission may not order contract rates disallowed unless, upon hearings and findings under such sections, the Commission finds such rates are unjust, unreasonable or unduly discriminatory. Section 7(e) of the Act provides that applications for certificates of public convenience and necessity shall be granted or denied by the Commission upon, and only upon, hearings and findings showing whether the proposed sale of gas is consistent with the present or future public convenience or necessity.

Order No. 242 and the February 19, 1963 application thereof to Pan American's contract constitute a substantive Section 4, 5 and 7 adjudication of whether Pan American may charge and collect its contract prices. However, such substantive adjudication is made summarily without hearings or findings as required by the Act and by Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004 and 1006, and by the Fifth Amendment to the Constitution of the United States.

Neither Order No. 242 nor the February 19, 1963 Letter Order are supported by facts or findings of fact showing that it is now necessary and proper to the administration of Sections 4, 5 or 7 of the Act that the price changing provisions of Pan American's contract which are operative after September 30, 1983, should now be eliminated. The Commission's conclusory statement that invalidation of flexible price changing clauses is now in the public interest and now necessary to making the task of regulation more manageable are not supported by findings of fact showing that the price changing provisions in Pan American's contract are "adverse to the public interest" and make the tasks of regulation not manageable. Furthermore, such conclusory statements are not standards governing substantive regulatory action under Sections 4, 5, or 7 of the Act. Section 16 of the Act does not prescribe substantive regulatory standards and does not itself authorize the taking of substantive regulatory action such as granting or denying certificates of public convenience and necessity or approving or disapproving increases in rates. Section 16 clearly does not authorize the Commission to emasculate Sections 4, 5, or 7 by making Sections 4, 5, or 7 substantive regulatory adjudications and decisions without satisfying the hearing requirements or regulatory standards prescribed therein.

The Commission's action is not supported by findings which even purport to rebut the finding in *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), that flexible price changing clauses are necessary and proper or by findings which purport to

justify discriminating against Pan American by denying flexible forward pricing to Pan American while permitting forward flexible pricing to Colorado Interstate.

Order No. 242 and the February 19, 1963, Letter Order are clearly arbitrary, capricious and unreasonable. In *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), the Court recognized that it is a business necessity that natural gas companies de-[fol. 96] termine the flexibility in rate making needed to enable them to file rates which they from time to time determine are needed to produce the income to maintain their financial integrity and gas reserves. The Commission's supposition that Pan American can predict for periods of 20 years or longer the revenue it will need to find and develop gas reserves sufficient to replace gas reserves that are currently being depleted is without foundation in fact and is unreasonable on its face. The Commission's supposition that rates which are below rates at issue in Section 4(e) rate hearings which involve other producers are sufficient to return to Pan American sufficient revenues to pay for replacing gas reserves as they are depleted is also unreasonable on its face. The mere fact that higher rates are currently at issue in rate adjudications shows that the lower rates may be confiscatory and such fact has no relationship to what rates are confiscatory with respect to specific sales by Pan American.

CONCLUSION

Order No. 242 and the February 19, 1963, Letter Order rejecting Pan American's certificate application are clearly unsupportable in law, fact or reason, and are, therefore, void as being in excess of the Commission's authority under the Natural Gas Act, the Administrative Procedure Act, and the Constitution of the United States.

WHEREFORE, Pan American respectfully requests that Order No. 242 and the February 19, 1963, Letter Order in Docket No. CI63-867 be vacated and set aside as being void and unlawful.

Respectfully submitted,

J. P. HAMMOND
WILLIAM H. EMERSON
P. O. Box 591
Tulsa 2, Oklahoma

[fol. 97]

THOMAS J. FILES
P. O. Box 40
Casper, Wyoming

WILLIAM J. GROVE
CARROLL L. GILLIAM
Dow Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

By: /s/ Wm. H. Emerson
WM. H. EMERSON

*Attorneys for Pan American
Petroleum Corporation*

Of Counsel:

Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D.C.

Dated at Tulsa, Oklahoma,
March 1, 1963

[fol. 98]

BEFORE THE FEDERAL POWER COMMISSION¹

Before Commissioners:

Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Pan American Petroleum Corporation

Docket No. CI63-867

ORDER DENYING APPLICATION FOR REHEARING—Issued
March 6, 1963

On March 4, 1963, Pan American Petroleum Corporation (Pan American) filed an application for rehearing of the Commission's letter order of February 19, 1963, which rejected Pan American's January 16, 1963, application for a certificate of public convenience and necessity and the related filing of its October 4, 1962, gas purchase contract with Colorado Interstate Gas Company as the proposed rate schedule because the contract contains pricing provisions other than those permitted by Section 154.93, as amended, of the Commission's Regulations under the Natural Gas Act (Act). No request for waiver has been filed pursuant to Section 1.7 of the Rules of Practice and Procedure.¹

For each five year period after October 1, 1983, the contract calls for "the establishment of the fair market price for the sale of gas hereunder . . .", by considering among other things prices in agreements "which at that time have been recently negotiated or renegotiated." It seems evident, therefore, that Paragraph 5.1 of the contract would permit a price redetermination based upon producer rates which are then in issue in suspension or certificate proceedings—a procedure clearly prohibited by

¹ Section 1.7 was amended and clarified by our Order No. 255 issued September 20, 1962.

Section 154.93. Pan American does not contend that Paragraph 5.1 comes within Section 154.93 and apparently did not draft it in order to meet the requirements of the Section. In essence Pan American attacks Section 154.93, as amended by Commission Orders Nos. 232, 232-A and 242 (Issued March 3 and 31, 1961, and February 8, 1962, respectively), as invalid because it is without reasonable basis in law and fact and goes beyond the powers granted to the Commission by the Act. However, Pan American presents no arguments that were not fully considered by the Commission when it issued the above mentioned orders.

The Commission finds:

The assignments of error and grounds for rehearing set forth in Pan American's application present no new facts or principles of law which were not considered by the Commission when it issued its letter order of February 19, 1963, or which having now been considered, warrant any change or modification of the order.

The Commission orders:

The application for rehearing filed by Pan American Petroleum Corporation on March 4, 1963, is hereby denied.

By the Commission.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary

*[Clerk's Certificate omitted in printing]

[fol. 100]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 7303

[Title Omitted]

[File Endorsement Omitted]

JOINT MOTION BY PETITIONER AND RESPONDENT FOR
ORDER OF CONSOLIDATION WITH CASE NO. 7002 AND
PERMITTING OTHER PROCEDURES — Filed March 11,
1963

Petitioner and Respondent in the above-captioned case hereby respectfully move the Court to enter an order or orders (a) consolidating this Case No. 7303 for argument on March 18, 1963, with Case No. 7002; (b) permitting Petitioner and Respondent to submit this Case No. 7303 upon the Briefs heretofore filed by the parties in Case No. 7002 and upon the pleadings, including the Petition for Review, now on file, in this Case No. 7303; and (c) permitting consideration and disposition of this Case No. 7303 by the Court simultaneously with its consideration and disposition of Case No. 7002 after the oral argument on March 18, 1963. In support of this Motion, Petitioner and Respondent show:

1. In Case No. 7002, Petitioner seeks review of Respondent's Order No. 242. That case has been fully briefed, and oral argument in that case is scheduled for March 18, 1963. However, in that case, Respondent has moved to dismiss on the grounds that Order No. 242 *per se* is not reviewable, but that the validity of the regulations promulgated by Order No. 242 can be reviewed only upon review of Respondent's subsequent action rejecting specific contract for filing.

2. In Case No. 7303, Petitioner now seeks review of action by Respondent so rejecting such a specific contract, and in this case, the Petition for Review includes as an appendix all of the pertinent documents from the record being certified to this Court by Respondent, including

[fol. 101] Respondent's Order issued March 6, 1963, denying rehearing below under Section 19(a) of the Natural Gas Act.

3. Respondent does not intend to move to dismiss Case No. 7303, and in Respondent's view, Case No. 7303 affords a proper vehicle for review of the regulations promulgated by Order No. 232-A and Order No. 242 by this Court. Accordingly, regardless of the Court's disposition of Case No. 7002 as to dismissal, Case No. 7303 will remain before the Court for disposition on the merits.

4. Petitioner and Respondent agree that their briefs in Case No. 7002 contain the pertinent arguments that they would make upon briefing in Case No. 7303, and that such briefs and the Petition for Review in Case No. 7303 thus afford the Court the arguments and presentations of orders, etc., which would be before the Court if additional briefs were filed in Case No. 7303, and a new record were printed therein.

5. Accordingly, Petitioner and Respondent wish to submit Case No. 7303 upon such pleadings therein, upon their respective briefs in Case No. 7002, and upon the oral argument now scheduled for March 18, 1963.

6. The parties believe that this procedure will be of substantial benefit to the parties and the Court in eliminating the substantial time and expense that will be required if Case No. 7303 is subsequently briefed and heard at a subsequent argument by the Court. Consolidation for argument will not require additional time for the argument now scheduled for March 18, 1963, and, in all respects, Petitioner and Respondent believe that thereafter the Case No. 7303 may be decided by the Court at the same time as Case No. 7002 is decided.

7. The filing of the Joint Motion and the averments herein are not intended by Petitioner or Respondent to be a change or waiver of their respective positions upon Respondent's Motion to Dismiss Case No. 7002.

WHEREFORE, Petitioner and Respondent respectfully move the Court to enter an order or orders

- (a) consolidating Case No. 7303 with Case No. 7002 for oral argument now scheduled for March 18, 1963;
- [fol. 102] (b) permitting Petitioner and Respondent to submit Case No. 7303 upon such oral argument, their respective briefs in Case No. 7002, and the Petition for Review and appendix thereto, already filed in Case No. 7303; and
- (c) permitting the Court to consider and decide Case No. 7303 simultaneously with Case No. 7002.

Respectfully submitted,

/s/ Peter H. Schiff
441 G Street, N. W.
Washington 25, D. C.
For Respondent, Federal
Power Commission

/s/ Carroll L. Gilliam
CARROLL L. GILLIAM
600 Munsey Building
Washington 4, D. C.
For Petitioner, Pan American
Petroleum Corporation

Dated at Washington, D. C., this 8th day of March, 1963.

[fol. 103]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[File Endorsement Omitted]

MAY TERM, 1963

Nos. 6947, 7135, and 7217

TEXACO, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Nos. 6973, 7002, and 7303

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

[fol. 104]

No. 7179

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Alfred C. DeCrane, Jr., and James J. Flood, Jr. (P. F. Schlicher and P. R. Wimbish were with them on the briefs), for petitioner, Texaco, Inc., in Nos. 6947, 7135, and 7217.

William H. Emerson and Carroll L. Gilliam (J. P. Hammond, Thomas J. Files, Harold H. Young, Jr., and William J. Grove, and Dow, Lohnes, and Albertson, of counsel, were with them on the briefs) for petitioner, Pan American Petroleum Corporation, in Nos. 6973, 7002, and 7303.

John A. Ward, III (Phillip D. Endom, Joiner Cartwright, Herf M. Weinert, Charles F. Heidrick, J. Colbert Peurifoy, Robert E. May, Louis Flax, John T. Ketcham and May, Shannon and Morley, and Martin A. Row, of counsel, were with him on the brief), for petitioner, Sun Oil Company, in No. 7179.

Peter H. Schiff, Attorney (Richard A. Solomon, General Counsel, Howard E. Wahrenbrock, Solicitor, and Milton J. Grossman and Arthur H. Fribourg, Attorneys, Federal Power Commission, were with him on the briefs), for respondent, Federal Power Commission.

[fol. 105]

Before MURRAH, Chief Judge, and BREITENSTEIN and HILL, Circuit Judges.

BREITENSTEIN, Circuit Judge.

OPINION—May 20, 1963

These seven cases present another episode in the history of the regulation by the Federal Power Commission of independent producers of natural gas subject to its jurisdiction. Basically the issue is the right of the Commission to reject summarily and without a hearing a gas-purchase

contract between a producer and a pipeline company on the ground that the contract contains indefinite price-changing clauses forbidden by Commission regulations.

At the outset we are faced, in all but one of the cases, No. 7303, with the Commission's procedural objections to the right of the producers to maintain petitions for review in this court. The insistence of the parties on their procedural rights impels us to resist the temptation to go directly to the heart of the controversy.

[fol. 106] The struggles of the Commission to administer the Natural Gas Act so as to regulate producers have been described many times in Commission reports and decisions and in court decisions. We shall review the situation only to the extent necessary for a background to the phase of the problem with which we are concerned.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 338, 341, the Supreme Court said that the Natural Gas Act¹ did not "abrogate private rate contracts as such" and construed §§ 4 and 5 of the Act² as parts of a statutory scheme under which "all rates are established initially by the natural gas companies." The gas is ordinarily sold in the field by a producer to a pipeline company which transports the gas to the area of use and there sells it to a retailer who makes distribution to the ultimate consumers. The pipelines must have a com-
[fol. 107] mitted source of gas supply sufficient to justify financing, construction, and operation. That supply is ordinarily obtained by long-term contracts of 20 years or more. The negotiation of a long-term contract presents problems of the continued fairness and adequacy of the original selling price.³ These problems have given rise to price escalation provisions.⁴ We have recognized

¹ 15 U.S.C. § 717.

² 15 U.S.C. §§ 717c and 717d.

³ Cf. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 113.

⁴ These provisions take many forms such as two-party favored-nation, three-party favored-nation, periodic escalation, redetermination, and spiral escalation. For the purposes of this decision an explanation of the differences is unnecessary except, as will later be discussed, in the differentiation between definite price-changing clauses and indefinite price-changing clauses.

contractual provisions for price escalation as unabrogated by the Act.⁵

[fol. 108] Within three months after the Mobile decision, the Commission gave notice in Docket No. R-153⁶ of a proposed regulation to prohibit the filing of producers' contracts containing either pricing clauses tied to buyers' rates and pricing indices, or favored-nation clauses. This docket lay dormant until March 3, 1961, when the Commission issued its Order No. 232⁷ declaring provisions for adjustment in price denoted as "indefinite escalation" clauses to be "inoperative and of no effect at law" in contracts tendered for filing after April 2, 1961. This order was superseded by Order No. 232-A⁸ which added the following to the definition of "rate schedule" as contained in § 154.93 of the regulations:

[fol. 109] "Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

"(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

⁵ *Cities Service Gas Producing Company v. Federal Power Commission*, 10 Cir., 233 F.2d 726, 730, certiorari denied 352 U.S. 911 (adjustments based on "prevailing field price" in a specific area); *Phillips Petroleum Company v. Federal Power Commission*, 10 Cir., 258 F.2d 906, 918 (escalations tied to the "weighted average royalty rate" in a defined area); *Kerr-McGee Oil Industries, Inc., v. Federal Power Commission*, 10 Cir., 260 F.2d 602 (adjustments in ratio to pipeline company's resale rate); *Warren Petroleum Corporation v. Federal Power Commission*, 10 Cir., 282 F.2d 312 (adjustments under two-party favored-nation clause).

⁶ 21 Fed. Reg. 2388, April 12, 1956.

⁷ 25 F.P.C. 379, 26 Fed. Reg. 1983, March 8, 1961.

⁸ 25 F.P.C. 609, 26 Fed. Reg. 2850, April 6, 1961.

"(2) provisions that change a price to a specific amount at a definite date; and

"(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

Hereafter we shall refer to contract provisions permissible under Order No. 232-A as definite price-changing clauses and to those impermissible under that order as indefinite price-changing clauses.

Pursuant to notice given on October 10, 1961, in Docket No. R-203,⁹ the Commission, on February 8, 1962, issued [fol. 110] its Order No. 242¹⁰ which made three amendments to the regulations. Section 154.93, defining producers' rate schedules, was amended to prescribe automatic rejection of contracts containing indefinite price-changing clauses. The amendment reads:

"Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above [Order No. 232-A] shall be rejected."

Order No. 242 also amended §§ 157.14 and 157.25 of the regulations so as to prohibit the consideration of contracts containing the forbidden clauses in support of a pipeline's application for a certificate of convenience and necessity.

The cases now before us attack the validity of Orders Nos. 232, 232-A, and 242. With this background we turn to the procedural questions.

⁹ 26 Fed. Reg. 9732, October 14, 1961.

¹⁰ 27 F.P.C. 339, 27 Fed. Reg. 1356, February 14, 1962. Rehearings denied 27 F.P.C. 666.

[fol. 111] Court review of Commission orders is governed by § 19(b) of the Act,¹¹ which provides that a party to a proceeding "aggrieved" by a Commission order may obtain a review in the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business," or in the Court of Appeals for the District of Columbia Circuit. The Commission asserts that venue does not lie in the Tenth Circuit for consideration of the three petitions of Texaco, Inc., Nos. 6947, 7135, and 7217, because the petitioner is not located in, and does not have its principal place of business in, that circuit. Texaco is incorporated under Delaware law and allegedly has its principal place of business in Texas. Venue in the Tenth Circuit depends on the meaning to be given the word "located."

Texaco's petitions for review allege that its Tulsa Division has responsibility for Texaco's producing activities and operations in an area including Oklahoma and Kansas. [fol. 112] sas.¹² The Tulsa Division operations include "the negotiation of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of state reports and the disposition of the production." In each case personnel of the Tulsa Division negotiated the contracts with the pipelines. That division supervises the performance of the contracts by Texaco, maintains records pertaining thereto, and receives payment for the gas sold. The certificate applications were made by the Tulsa Division.

The Commission asserts that the word "located" as used in § 19(b) means the same as "resides" and refers to the state of incorporation. Oddly enough, the extensive litigation over the Natural Gas Act has not produced an answer [fol. 113] to this simple question. Perhaps the reason

¹¹ 15 U.S.C. § 717r(b).

¹² Another of Texaco's seven producing department divisions is headquartered in Denver, Colorado, and has similar responsibilities for an area including Colorado, New Mexico, Utah, and Wyoming, all states of the Tenth Circuit.

is that the point concerns venue rather than jurisdiction.¹³ The Commission asserts a "long-established understanding" of the Commission and the natural-gas companies that "located" refers to the state of incorporation, and cites an impressive list of cases brought in the Third Circuit on the basis of the incorporation of the natural-gas companies, which were parties thereto, in one of the states of the Third Circuit. Texaco counters with an equally impressive list of cases wherein review was had in a circuit in which the natural-gas company was not incorporated and did not have its principal place of business. As venue may be waived, we are not impressed with this approach.

In a long line of decisions, beginning with *Shaw v. Quincy Mining Company*, 145 U.S. 444, 450, the Supreme Court has held that the residence of a corporation within the meaning of venue statutes is only the state of incorporation. In *Suttle, Administratrix, v. Reich Bros. Construction Co.*, 333 U.S. 163, 166-167, the Supreme Court [fol. 114] reviewed these cases and said that Congress has revealed a similar understanding in the enactment of special venue statutes. The presumption is that Congress was aware of the applicable decisions, and its recognition of them, when it enacted the Natural Gas Act.¹⁴

The parties agree that the pertinent language of § 19 (b) was taken from § 313(b) of the Federal Power Act.¹⁵ The legislative history of that section shows that "is located" was substituted for "resides."¹⁶ The Commission

¹³ *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 638.

¹⁴ *Shapiro v. United States*, 335 U.S. 17, 16. Cf. *Public Service Company of New Mexico v. General Electric Company*, 10 Cir., — F.2d —, decided March 15, 1963; *United States v. Sanders*, 10 Cir., 145 F.2d 458, 461.

¹⁵ 16 U.S.C. § 8251(b).

¹⁶ The first version of what ultimately developed as § 313(b) of the Federal Power Act (Part III of the Public Utilities Holding Act of 1935, Part III, Act of August 26, 1935, c. 687, § 313(b), 49 Stat. 803, 854, 860, appeared in S. 1725, 74th Cong., 1st Sess. In its briefs the Commission says that this bill provided that a person aggrieved could obtain review of a Commission order in a court of appeals "for any circuit wherein such person resides or has his principal place of business," and that a revised bill,

[fol. 115] says that there is no explanation of the purpose of the change. In our opinion the change is significant and the deliberate substitution of words shows a congressional intent not to narrow the provision to the state of incorporation. If Congress had so intended, it would have retained the word "resides."

The Commission urges that, unless "is located" is equated with "resides," the insertion of the phrase "principal place of business" is but an exercise in redundancy violative of the rule that all terms of a statute must be given effect. We do not agree. Congress is presumed "to have used language in accordance with the common understanding."¹⁷ "Located" means having physical presence or existence in a place.¹⁸ A corporation has physical presence [fol. 116] once or existence in the state of incorporation and in a state where it conducts substantial operations. Granting that a corporation is located in the state in which it has its principal place of business, the overlap in provisions must be for the purpose of clarity. The fact of the overlap does not detract from the effect of the substitution of "is located" for "resides." We deem the change in phraseology to be more significant than the overlap.

This conclusion does not intend that the mere legal indicia of "doing business" will support venue under § 19 (b). In *Colorado Interstate Gas Co. v. Federal Power Commission*, 10 Cir., 142 F.2d 943, 950-951,¹⁹ we denied

S. 2796, contained the venue provisions now found in § 313(b). The significant modifications are that the reference point for venue is the licensee or public utility rather than the petitioner, and that the words "is located" replace "resides."

¹⁷ *United States v. Wurts*, 303 U.S. 414, 417.

¹⁸ Webster's New International Dictionary, 2d ed. (1959). Unabridged, defines "locate" as: "1. To designate the site or place of: * * *. 2. a. To set or establish in a particular spot or position; to station. b. To establish in a charge or office. * * * " The word "location" is defined as: "1. Act or process of locating (in various senses); fact or condition of being located, or of having position. * * * "

¹⁹ Affirmed, *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581; affirmed in part, reversed in part on other grounds, *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626.

a motion to dismiss and held that the petitioners in that [fol. 117] case had their principal places of business in Colorado, saying that the question was one "of fact to be determined in each particular case." The same principle applies here and the question of whether Texaco is located in the Tenth Circuit must be determined on the particular facts. The undenied allegations of Texaco are that it conducts extensive operations in the Tenth Circuit and has two of its seven production divisions therein. More importantly, in each of the cases the gas sold is produced in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit. As all matters concerned with the applications of Texaco which resulted in the orders here sought to be reviewed took place in the Tenth Circuit, Texaco is located in that circuit for the purpose of the venue provisions of § 19(b).

The Commission has moved to dismiss cases Nos. 6947, 6973, 7002, 7135, and 7179 upon the ground that in each case the petitioner is not "aggrieved" within the requirement of § 19(b). The facts in these cases divide them [fol. 118] into two groups which must be considered separately.

In the first group are cases Nos. 7002 and 7179.²⁰ Each of these seeks to review and set aside Order No. 242. That order was issued as a rule of general applicability and amended certain sections of the regulations.

In moving to dismiss these cases the Commission asserts that the Act vests no jurisdiction in the courts of appeals to review orders of the Commission amending its general rules and regulations. The petitioners counter by saying that reviewability is predicated on an invasion of legal rights and that such rights of the petitioners are directly affected by Order No. 242.

The Tenth Circuit is committed to the view that § 10 of the Administrative Procedures Act²¹ is inapplicable to the

²⁰ No. 7179—Sun Oil Company v. Federal Power Commission—was originally filed in the Court of Appeals for the District of Columbia Circuit and was transferred to the Tenth Circuit pursuant to the provisions of 28 U.S.C. § 2112 because of the earlier petition filed in the Tenth Circuit by Pan American in No. 7002.

²¹ 5 U.S.C. § 1009.

review of Commission orders under the Natural Gas [fol. 119] Act.²² Accordingly, the right of review is governed entirely by § 19(b) of the Natural Gas Act. That section permits review on the petition of a party aggrieved. The query is when, and in what circumstances, is a party aggrieved.

Sales of gas by producers to pipelines are initiated by private contract and those contracts are subject to review by the Commission under statutory standards. No right exists in the seller to change a rate fixed by contract unless the contract itself recognizes a right to change the rate. An order of the Commission proscribing price-changing provisions is an interference with the right to contract and a denial of a substantive right. Without considering for the moment the question of the power of the Commission to interfere with such a substantive right, those to whom the right is denied are entitled to court review of such action to test whether the action is within the statutory powers of the Commission. The problem is how this review may be had under § 19(b).

An easy and quick method of reviewing orders which affect substantive rights and which are of general applicability would aid the administration of the Act. The difficulty is that the Commission has construed § 19(b) so as to preclude any such expeditious review and the position of the Commission has been quite uniformly upheld by the courts.

In seeking reviews of orders of general applicability the petitioners rely on the decisions in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, and *United States v. Storer Broadcasting Co.*, 351 U.S. 192, in which rules of general applicability affecting substantial rights were held reviewable under other statutes. The courts of appeals have not applied these decisions in determining rights to review under § 19(b). Without going into the distinctions and differences which have been stated, the controlling point has been that a person is not aggrieved by a general order and cannot complain until a [fol. 121] personal right is impinged by a special order.

²² *Amerada Petroleum Corporation v. Federal Power Commission*, 10 Cir., 231 F.2d 461, 465.

The Tenth Circuit, in *Amerada Petroleum Corporation v. Federal Power Commission*, 10 Cir., 231 F.2d 461, declined to review order. Issuing rules after the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672. In so holding it relied heavily on *United Gas Pipe Line Co. v. Federal Power Commission*, D.C.Cir., 181 F.2d 796, certiorari denied 340 U.S. 827, and that court's treatment of the *Columbia Broadcasting* case. More recently, the Fifth Circuit has sustained Commission motions to dismiss petitions seeking to review Order No. 232-A²³ and to review Order No. 242.²⁴ We accept these decisions as correct applications of § 19(b). Certainly the language of the statute is strained if review may be had of a negative or [fol. 122] der of general applicability by a party who has not been, and may never be, affected by the order except in a theoretical manner. Accordingly, Nos. 7002 and 7179 must be dismissed on the ground that the petitioners are not aggrieved within the meaning of § 19(b).

The second group of cases attacks special orders made under the authority of the mentioned general orders. In each instance the questioned decisions have granted the authority sought but provide that any application for a rate change under an impermissible price-changing clause will be rejected.

Nos. 6947, 6973, and 7135, concern applications for certificates of convenience and necessity covering gas sales by producers to pipelines. In Nos. 6947 and 7135 the same contract is presented, one for the sale by Texaco to Lone Star Gas Company of gas produced in the Carter-Knox Field, Stephens County, Oklahoma. In No. 6973 the sale is by Pan American to Mountain Fuel Supply Company of gas from the Middle Mountain Unit Area, Sweetwater County, Wyoming. Each contract was made or amended after the effective date of Order No. 232-A and

²³ *Sun Oil Company v. Federal Power Commission*, 5 Cir., 304 F.2d 293, certiorari denied 371 U.S. 861.

²⁴ *Hunt Oil Company v. Federal Power Commission*, 5 Cir., 306 F.2d 878. The Third Circuit took similar action in an unreported case, *Shell Oil Company v. Federal Power Commission*, case No. 14058, decided July 17, 1962.

[fol. 123] contains indefinite price-changing clauses. The Commission granted temporary authorizations in Nos. 6947 and 6973. A permanent certificate was granted in No. 7135 for the same service as that presented in No. 6947.

In each of the three cases the order of the Commission contains this provision in substantially identical language:

"Further, in the event that any of the documents comprising the listed rate schedules and supplements was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected."

The petitions for review in these cases are directed against the quoted provision of the respective orders. The Commission has moved to dismiss each on the ground that the petitioner is not a party aggrieved.

On the one hand the petitioners say that Order No. 232-A, as implemented by the orders containing the provision in question, has effectively nullified indefinite price-changing [fol. 124] ing clauses and thus deprived petitioners of contract rights assured to them by the Act and by the Mobile decision. On the other hand the Commission urges that the orders sought to be reviewed in these cases do not themselves adversely affect the petitioners but only affect their rights adversely on the contingency of future administrative action.

In *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 10 Cir., 270 F.2d 404, 407, the Tenth Circuit dismissed, on Commission motion, a petition to review a Commission order authorizing temporary service and providing that service once instituted could not be discontinued without Commission permission. Objection was made to the provision for termination of service. The dismissal was on the ground that the petitioner had not

sought to terminate and, hence, was not aggrieved.²⁵ In *Sun Oil Company v. Federal Power Commission*, 5 Cir., [fol. 125] 304 F.2d 290, certiorari denied 371 U.S. 861, the Fifth Circuit was confronted with a situation comparable to the one here presented. Objection was made to the inclusion in an authorization for temporary service of a provision, similar to that appearing in Nos. 6947, 6973, and 7135, for the rejection of rate increases covered by impermissible price-changing clauses. The court sustained the Commission motion to dismiss saying that the clause attacked was interlocutory and not reviewable.

We conclude that the provisions of the orders attacked in Nos. 6947, 6973, and 7135 do not adversely affect any right of the petitioners and, hence, the petitioners are not aggrieved within the requirement of § 19(b). That conclusion does not mean that Orders Nos. 232, 232-A, and 242 are valid or that contracts executed after the effective date of those orders are "inoperative" or "of no effect at law" when they contain indefinite price-changing clauses.

This brings us to No. 7303, in which the Commission has interposed no procedural objections to the petition for [fol. 126] review, and to No. 7217 in which we hold that the motion to dismiss must be denied. In each of these the Commission rejected an application for a certificate of convenience and necessity on the ground that the underlying contract contained pricing provisions not permissible under § 154.93, as amended by Order No. 232-A.²⁶ The rejection was based on Order No. 242. As we have heretofore stated, that order provides for the rejection of ap-

²⁵ The court, quoting from *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 130, said: " * * * the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action."

²⁶ No. 7217 relates to an application by Texaco for a certificate covering a sale by it to Natural Gas Pipeline Company of America of gas produced in the Camrick Southeast Field, Beaver County, Oklahoma. The application in No. 7303 is based on a contract for the sale by Pan American to Colorado Interstate Gas Company of gas produced in the Beaver Creek Field, Fremont County, Wyoming. Each contract contains indefinite price-changing clauses.

plications for certificates when the underlying contract contains price-changing clauses forbidden by Order No. 232-A.

Our difficulty is immediately apparent. The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question—the propriety of indefinite price-changing clauses.

Neither sympathy for the administrative difficulties of the Commission nor recognition of its expertise in the regulation of those subject to the Natural Gas Act justifies disregard of the statutes under which the Commission operates. We find no statutory authorization for the Commission actions here attacked.

Section 16 of the Act²⁷ empowers the Commission to make rules and regulations to carry out the provisions of the Act but that section is not a source of power to regulate in conflict with substantive provisions of the Act.²⁸ [fol. 128] The Commission asserts that the necessary authority flows from §§ 4, 5, and 7.²⁹

Sections 4 and 5 relate to rates and charges and give the Commission power to modify contracts—not to make contracts. The power to modify can be exercised only after hearing. The controlling standard is what is just and reasonable.³⁰

²⁷ 15 U.S.C. § 717c.

²⁸ Cf. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508. See also *Willmut Gas & Oil Company v. Federal Power Commission*, D.C. Cir., 294 F.2d 245, 250, certiorari denied 368 U.S. 975, saying that § 16 does not permit the Commission to promulgate rules inconsistent with the Act and thus result in a legislative change.

²⁹ 15 U.S.C. §§ 717c, 717d, and 717f.

³⁰ Section 4, subparagraph (a), provides that all rates and charges must be just and reasonable. Subparagraph (c) requires the filing of schedules showing all rates and charges "together

[fol. 129] Section 7(c) provides that no natural-gas company "shall engage in the transportation or sale of natural gas" without a certificate of public convenience and necessity and with immaterial exceptions requires the Commission to set "for hearing" applications to obtain such certificates. Section 7(e) states that the certificate will issue if the Commission finds that the proposed service "is or will be required by the present or future public convenience and necessity."

The Commission held no hearings relative to the promulgation of Orders Nos. 232, 232-A, or 242. Nevertheless, [fol. 130] the Commission made findings allegedly justifying such orders.³¹ In summary the Commission found that indefinite price-changing clauses are "undesirable, unnecessary and incompatible with the public interest;"³² that such contract provisions "have resulted in a flood of almost simultaneous filings" which "bear no apparent relationship to the economic requirements of the producers

with all contracts which in any manner affect or relate to such rates, charges, * * * " Subparagraph (d) forbids a change in a rate or charge without 30-days' notice to the Commission. Subparagraph (e) provides that when a new rate schedule is filed, the Commission, either on complaint or on its own initiative, but on reasonable notice may "enter upon a hearing concerning the lawfulness" thereof; that the Commission may suspend a new schedule for five months; that "after full hearings, * * * the Commission may make such orders with reference thereto as would be proper" in a § 5 proceeding; and that if the proceedings have not been concluded and an order entered at the end of the suspension period, the proposed change shall go into effect but the Commission may require a bond for refund of overpayments.

So far as material, § 5 provides that when the Commission, "after a hearing," on its own motion or on complaint, finds that a "rate, charge, or classification" or "any rule, regulation, practice, or contract" having an effect thereon, is "unjust, unreasonable, unduly discriminatory, or preferential," the Commission shall determine and fix by order "the just and reasonable rate, charge, classification, rule, regulation, practice, or contract."

³¹ These findings are reported for Order No. 232, at 25 F.P.C. 380, 26 Fed. Reg. 1983; for Order No. 232-A at 25 F.P.C. 609, 26 Fed. Reg. 2850; and for Order No. 242 at 27 F.P.C. 339-340, 27 Fed. Reg. 1356.

³² 25 F.P.C. 380, 26 Fed. Reg. 1983.

who file them;" and that such filings "have created a significant portion of the administrative burdens under which this Commission is laboring today."³³

These findings are not made in the language of the statutory standards of "just and reasonable" and "public convenience and necessity." The public interest must be related to and tested by these standards. Although the Commission is the guardian of the public interest in the [fol. 131] administration of the Act, the Commission may not substitute its standards for the statutory standards. Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them.³⁴ In the cases at bar the Commission has held no adversary hearings at which facts have been adduced to sustain findings which, on the basis of statutory standards, support the decisions reached. No amount of administrative expertise can supply these deficiencies.

The Commission vigorously asserts the validity of Orders Nos. 232, 232-A, and 242 as orders of general application within Commission power which are desirable and preferable to a case-by-case approach to the regulatory problems. At the same time the Commission with equal vigor says that the orders are reviewable only on a case-by-case basis after rejection of a particular contract containing clauses impermissible under the general orders. Such a divided approach to a basic and difficult problem cannot throw a cloak of conclusive validity over general orders. If the general orders are not themselves reviewable and if special orders based thereon are not reviewable when the result falls short of the denial of

³³ 27 F.P.C. 340, 27 Fed. Reg. 1357.

³⁴ The Commission's reliance on its decision in the case of The Pure Oil Company, 25 F.P.C. 383, is not helpful. The Commission there held that indefinite escalation provisions are, in general, contrary to the public interest. The Commission order was affirmed on review, *Pure Oil Company v. Federal Power Commission*, 7 Cir., 299 F.2d 370, but the court did not discuss the problems with which we are concerned. In any event a record made in that proceeding is not dispositive of the issues now under consideration.

a presently asserted substantive right, then those general orders are only of an advisory nature and neither forbid the inclusion in contracts of indefinite price-changing clauses nor justify the rejection, on the sole ground of violation of general regulations, of contracts containing such clauses.

The Commission argues that in making the challenged orders it was "legislating interstitially, as contemplated by the Act." Although the "filling in the interstices of [fol. 133] the Act" may be performed through a "quasi-legislative promulgation of rules,"³⁵ administrative officers must keep within the bounds of their administrative powers,³⁶ which are limited by the scope of the statute.³⁷ In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-618, the Supreme Court said:

" * * * not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. * * * For the ultimate question is what has Congress commanded * * * "

Under the Natural Gas Act and the Mobile decision, rates and charges for the sale of gas are initially prescribed by private contract and may be increased only in accordance with contract provisions. Contracts establishing such rates and charges and providing for changes therein may be modified by the Commission only after hearing and then only by the application of the standards of "just and reasonable" and "public convenience and necessity." The summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives

³⁵ *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 202.

³⁶ *American Telephone & Telegraph Co. v. United States*, 299 U.S. 222, 236.


³⁷ *Federal Communications Commission v. American Broadcast Co., Inc.*, 347 U.S. 284, 290.

the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review.

Perhaps in some regards the Commission may "legislate interstitially" but in our opinion it may not do so when its action results in the denial of substantive rights. The horrendous consequences of such actions are well described in *Hunt v. Federal Power Commission*, 5 Cir., 306 F.2d 334, 342-345, and need not be repeated here. Within its constitutional powers Congress may legislate on substantive rights without hearings and findings. The Commission has attempted to usurp that congressional power. No claim of administrative need or of frustration in the performance of its duties can make up for the lack of statutory authority.

We are deciding only the cases before us. The problems of area pricing are not presented here. In our opinion Order No. 242 is void and without effect. Orders Nos. 232 and 232-A are in a different category. As advisory declarations of Commission policy they determine no rights. At the same time those orders do not, and cannot, invalidate either retroactively or prospectively price-changing clauses in a gas-sale contract between a producer and a pipeline and are no justification for the rejection, without hearing, of a rate or charge based on such clauses.

For the reasons stated the motions to dismiss Nos. 6947, 6973, 7002, 7135, and 7179 are sustained and those cases are dismissed. The motion to dismiss No. 7217 is denied. The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in this opinion.



[fol. 136]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUDGMENT—May 20, 1963

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Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

These causes came on to be heard and were argued by counsel.

On consideration whereof, for the reasons stated in the opinion of this court, the motions to dismiss cases Nos. 6947, 6973, 7002, 7135 and 7179 are sustained and these cases are dismissed out of this court.

The motion to dismiss case No. 7217 is denied.

The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in the opinion of the court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ORDERS STAYING MANDATE

By orders of June 24, 1963, and July 22, 1963, the mandate of the United States Court of Appeals was stayed to and including August 21, 1963, under provision of paragraph 3 of rule 28 of said court.

[fol. 137]

[Clerk's Certificate to foregoing
transcript omitted in printing]

[fol. 138]

SUPREME COURT OF THE UNITED STATES

No. 386, October Term, 1963

FEDERAL POWER COMMISSION, PETITIONER

VS.

TEXACO., ET AL.

ORDER ALLOWING CERTIORARI—November 12, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

**TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT**

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, entered on May 20, 1963.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 21-44) is reported at 317 F.2d 796.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's orders and remanding the proceedings were entered on May 20, 1963. (App. B, *infra*, p. 42). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The Federal Power Commission summarily rejected applications for certificates of public convenience and necessity filed by respondent gas producers because they were based upon contracts containing price-changing provisions of a kind which the Commission had proscribed by regulation as contrary to the public interest.

The question presented is whether the Commission may proceed by way of the rule-making power to prohibit contractual arrangements (including spiral escalation clauses, favored-nations provisions and other types of indefinite pricing) which it finds incompatible with the public interest or whether, as held by the court of appeals, it may establish and implement its policies in this area only by case-by-case adjudication.¹

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001-1011, the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, and of the Commission's regulations, as amended, 18 C.F.R. (Cum. Supp. 1963), are set out in Appendix C, *infra*, pp. 43-54.

STATEMENT

The challenged regulations.—The decision below invalidates regulations of the Commission prohibiting certain price-changing provisions—such as “favored-nation,” unlimited price-redetermination, and “spiral

¹ If certiorari is granted, the Commission also reserves the right to argue that the court below erred in not dismissing Texaco's petition for review for lack of proper venue under Section 19(b) of the Natural Gas Act.

escalation" clauses—in independent producer contracts. Thus, the court has set aside two orders of the Commission rejecting out-of-hand producer applications based on contractual provisions concededly forbidden by the agency's regulations.

The Commission's Regulations under the Natural Gas Act, Section 154.91 *et seq.*, as amended (18 C.F.R. (Cum. Supp. 1963) 154.91 *et seq.*), provide that independent producers subject to the agency's jurisdiction shall file their contracts as rate schedules. Section 154.93 provides in part:

* * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question * * *

This language was added by Order No. 232, issued March 3, 1961 (T.R.² 11-16, 25 FPC 379, 26 Fed. Reg. 1983), as amended by Order No. 232A, issued March 31, 1961 (T.R. 17-19, 25 FPC 609, 26 Fed. Reg. 2850).

Section 154.93 of the regulations further provides that "any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions" described above "shall be rejected." Similarly, Section 157.25 provides that an independent producer application for a certificate of public convenience and necessity "shall be rejected" if any contract submitted in support of it contains the forbidden provisions; and Section 157.14(a)(10)(v) provides that any producer contract executed after April 2, 1962, which has this infirmity, "will be given no consideration in determining adequacy" of a pipeline company's gas-supply showing in support of a certificate application. These provisions were added to the regulations by Order No. 242, issued February 8, 1962 (T.R. 20-23, 27 FPC 339, 27 Fed. Reg. 1356).

Procedural history of the regulations.—Orders No. 232 and 232A, which amended Section 154.93 by limiting the types of price-changing provisions that would be permissible in producer contracts executed after the effective date of those orders, were issued in a rule-making proceeding initiated by a notice of proposed rule-making published in the Federal Register on April 12, 1956 (21 Fed. Reg. 2388) and the

² "T.R. —" refers to the pages of the printed transcript of record below in the *Tezaco* case, C.A. 10, No. 7217.

mailing of notices to interested parties including state and regulatory agencies (T.R. 11, 25 FPC at 380). In its notice (21 Fed. Reg. 2388), the Commission announced that it proposed to amend its regulations governing independent producers by designating certain types of contracts for the sale of natural gas which would not be accepted for filing as rate schedules. Specifically, it proposed to reject contracts containing provisions calling for price adjustments keyed to "(a) escalator clauses based on price indices or changes in the price received by the purchaser upon resale, or (b) the payment or offer of payment of higher prices by the purchaser or other purchasers in the same or other producing areas to the same or other sellers" (21 Fed. Reg. 2389).

The notice invited comments on or before June 1, 1956 (21 Fed. Reg. 2389). Numerous responses, including comments from Texaco and Pan American,³ were received by the Commission, both in support of and in opposition to the proposed rule. Later, in *Pure Oil Co.*, 25 FPC 383, affirmed, 299 F. 2d 370 (C.A. 7), the Commission had the benefit of extensive hearings, briefs and oral arguments on the issue of whether or not favored-nation clauses are contrary to public policy.⁴

³ At the time of making these comments, the names of the companies were The Texas Company and Standard Oil and Gas Company, respectively.

⁴ While that case was decided on the ground that the favored-nation clause had not been triggered, the Commission, as stated in Order No. 232, explained there why it regarded indefinite escalation clauses to be contrary to the public interest. *Pure Oil Co.*, 25 FPC 383, 387-391.

The upshot of the rule-making proceeding was the issuance of Order No. 232 (T.R. 11-16, 25 FPC 379), on March 3, 1961. In that order, the Commission found that long-term gas supply contracts containing "indefinite escalation clauses" (which it defined as all price escalation provisions other than those calling for increases of specific amounts at definite dates or those intended to reimburse the seller for all or any part of changes in production, severance or gathering taxes levied on the seller) "have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies," and that such clauses are contrary to the public interest, as found in *Pure Oil Co.*, 25 FPC 383. Accordingly, it amended the regulations to prohibit the use of indefinite escalation provisions in new producer contracts. This was accomplished by adding definitions of "definite" and "indefinite" escalation clauses to Section 154.91 of the regulations and by adding a proviso to Section 154.93 declaring that any provision for a change of price based on an indefinite escalation clause in a contract filed on or after April 3, 1961, would be "inoperative and of no effect at law" (T.R. 12-13, 25 FPC at 381). Order 232 also provided that the amendments to the regulations there promulgated would become effective April 3, 1961, and specified that any interested person could submit written views or comments to the Commission by March 20, 1961. T.R. 13, 25 FPC at 381.

On March 31, 1961, the Commission, upon consideration of further comments filed by interested persons, including Texaco and Pan American, issued

Order 232A modifying Order 232. In this order, the Commission found that it "appears that elimination of all indefinite escalation provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-term contracts, we should permit future contracts to contain limited price-redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and therefore, controlled)." (T.R. 17-18). It also concluded that the amendment to the regulations should apply only to contracts "executed" on or after April 3, 1961 (under Order 232 the amendment would have applied to contracts "filed" on or after that date, whenever executed).*

Order 242, which spelled out the procedures to be used in effectuating the amended provisions of Section 154.93 of the regulations promulgated by Order 232A, was also issued as a rule of general applicability. It, too, was initiated by a notice of proposed rule-making (26 Fed. Reg. 9732), and by the mailing of notices to interested persons, including natural gas companies and state and federal agencies (T.R. 20, 27 FPC 339). In that notice, the Commission stated (26 Fed. Reg. 9732, 9733):

* Sun Oil Company's petition to review Order Nos. 232 and 232A was dismissed for lack of jurisdiction. *Sun Oil Co. v. Federal Power Commission*, 304 F. 2d 293 (C.A. 5), certiorari denied, 371 U.S. 861.

Having found in Order No. 232A that indefinite escalation provisions" * * * are generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies * * *", it appears that no useful purpose can be served by the Commission's acceptance of contracts containing indefinite price escalation provisions or of applications relying upon contracts having such provisions as proof of the applicants' gas supply.*

Following receipt of numerous responses (T.R. 20, 27 FPC 339), again including comments from Texaco and Pan American, the Commission on February 8, 1962, adopted an order amending the rules to conform with the present language. The Commission again explained the basis for the existing regulations, the validity of which had been challenged in many of the comments. It stated, *inter alia*, that it could not acquiesce in indefinite price-changing provisions because they hampered effective rate regulation, and that the existing regulation and the amendments thereto were necessary to remove a serious impediment to the performance of the Commission's statutory duties.

*The specific amendments proposed were substantially the same as those eventually adopted in Order 242, except that the proposed regulations would have rejected rate schedules or certificate applications filed after the specified date, rather than only those executed after the specified date as provided by Order 242.

*A number of producers filed applications for rehearing of Order 242. After these were denied on April 4, 1962 (27 FPC

The present cases.—On the basis of these regulations, the Commission rejected applications of Texaco and Pan American for certificates of public convenience and necessity on the ground that they depended upon contracts containing impermissible price-changing provisions (T.R. 62, P.³ Pet. for Rev. p. 9a). In their applications for rehearing, Texaco and Pan American complained, in essence, that the summary rejections were invalid because of the alleged invalidity of the regulations on which they were based. Neither company requested a waiver of the regulations, as they were permitted to do by Section 1.7(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. (Cum. Supp. 1963) 1.7(b).

The court below set aside the Commission's orders, holding (App. A, *infra*, p. 40) that the "summary rejection of applications based on contracts containing

666), six petitions for review of that order were filed. Each of these has now been dismissed on motions of the Commission.

The Fifth Circuit dismissed the petitions of Hunt Oil Company, Humble Oil & Refining Company, and the Superior Oil Company. (*Hunt Oil Co. v. Federal Power Commission*, 306 F. 2d 878) and the Third Circuit dismissed *Shell Oil Co. v. Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962 (unreported). The opinion of the Tenth Circuit in this case dismissed the petitions of Pan American in C.A. 10, No. 7002, and Sun Oil Company in C.A. 10, No. 7179. App. A, *infra*, pp. 30-32.

* Pan American's petition for review in the case below contained all material normally included in a joint appendix or printed record. This procedure was agreed upon by the Commission below to permit the case to be consolidated for hearing with the six other petitions for review, relating to the validity of these regulations, then pending in the court below.

price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review.”*

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question as to the scope of the Commission's rule-making powers under Section 16 of the Natural Gas Act. That section vests the Commission with broad authority to issue such rules of general applicability “as it may find necessary or appropriate to carry out the provisions” of the Act. Under Sections 4 and 5 of the Act, the Commission is empowered to require the modification of contractual provisions which it finds to be unjust and unreasonable, and under Section 7 it may condition the issuance of an initial certificate upon the removal of contract provisions found incompatible with the public convenience and necessity. To carry out these Sections and to particularize the statutory standards, the Commission adopted regulations prohibiting, for the future, various contractual arrangements which it concluded, both on the basis of long experience and extensive rule-making proceedings, were inimical to the public interest.

Without reaching the substantive question of the reasonableness of these particular regulations, the court below has held that the Commission has no power to

* In addition to the two cases here involved, Commission orders rejecting certificate applications based on contracts con-

adopt a rule of general application which would enable it to reject at the threshold a certificate application based upon a contract containing one of the forbidden provisions.

We believe that the court of appeals' decision is in direct conflict with the decision of this Court in *United States v. Storer Broadcasting Co.*, 351 U.S. 192; that it is plainly in error; and that, if permitted to stand, it would emasculate the Commission's power to issue substantive rules of general application under Section 16 of the Natural Gas Act.

1. In holding that the Commission could not, without a full evidentiary hearing, reject an application on the basis of policy standards set forth in a general rule or regulation, the decision collides with this Court's ruling in *United States v. Storer Broadcasting Co.*, 351 U.S. 192. There, the Federal Communications Commission, pursuant to its general rule-making authority, issued an order amending its Multiple Ownership Rules for radio and television stations. Storer, a broadcaster whose ownership of seven stand-

taining proscribed price-changing provisions have been challenged in the Ninth and Fifth Circuits. The Ninth Circuit heard argument in *Superior Oil Co. v. Federal Power Commission*, No. 18252, on May 6, 1963. *Sun Oil Co. v. Federal Power Commission*, C.A. 5, No. 20290, has been briefed and is ready for argument. In *Humble Oil & Refining Co. v. Federal Power Commission*, C.A. 5, No. 20616, petition for review filed June 13, 1963, the petitioner challenges the rejection of an amendatory agreement containing proscribed price-changing provisions. In that case, the court has granted a joint motion of the Commission and Humble to hold the case in abeyance until after final disposition of the present case.

ard radio and five television stations constituted, under the amended Rules, an automatic disqualification for further licensing, challenged the Rules in the court of appeals on the ground that they were in conflict with § 309 of the Communications Act, 47 U.S.C. 309, requiring (a) that a license be granted where the public interest would be served, and (b) that a hearing be held before denial of an application. The court of appeals invalidated the general order, holding (220 F. 2d 204, 208) that "any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." In this Court, the Communications Commission argued, just as the Power Commission does here, that rules may validly give concreteness to a standard of public interest; that the right to a hearing does not apply where an applicant admittedly does not meet those standards since there would be no further facts to ascertain; and that the agency's regulations afforded applicants an opportunity to allege exceptional circumstances which might, in individual cases, warrant a waiver of the Rules (351 U.S. at 201). This Court agreed, reversing the decision below upon the following analysis (351 U.S. 202-203, 205):

We do not read the hearing requirement * * * as withdrawing from the power of the Commission the rule-making authority necessary for the orderly conduct of its business. As conceded by Storer, "Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest."

The challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r) grant general rulemaking power not inconsistent with the Act or law.

* * * We read the Act and Regulations as providing a "full hearing" for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309(b), n. 5, *supra*, would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

Precisely the same considerations are controlling here. Under Section 1.7(b) of the Power Commission's Rules and Regulations (18 C.F.R. (Cum. Supp. 1963) 1.7(b) (App. 50-51)), respondents were free to petition for a waiver or modification of the Regulation prohibiting indefinite price-changing clauses and, by setting forth reasons sufficient on their face to provide

a basis for such relief, would have been entitled to a hearing. Similarly, they would have been granted an evidentiary hearing if at any point they had raised any substantial factual issue as to the applicability of the Regulation in the particular circumstances. See *Atlantic Refining Co.*, F.P.C. Docket No. CI62-1562, order of September 13, 1962, granting rehearing of rejection order, 27 Fed. Reg. 9362. The fact is, however, that neither respondent has ever asserted that the Regulation, if valid, would not cover, or for some reason ought not be applied to, the escalation clauses in its contract. What the Natural Gas Act does not require, any more than did the Federal Communications Act involved in *Storer*, is that the Commission hold a full evidentiary hearing in each case merely to redetermine the wisdom of its general rule or to reappraise the "legislative facts" on the basis of which that rule was adopted.

The *Storer* case also disposes of the objection that the Commission's action "precludes the possibility of effective judicial review." In *Storer*, as in the present case, a substantive rule was issued on the basis of comments, data, and views submitted by interested persons in accordance with the provisions of Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b) (App. 43-44). While the Tenth Circuit apparently concluded here that it could not determine the reasonableness of any substantive rule without any evidentiary record, this Court had no difficulty in passing upon the FCC's Multiple Ownership Rules at issue in *Storer*. See also *Transcontinent Television Corp. v. Federal Communications Commission*, 308 F.2d 339

(C.A.D.C.) (rule-making record held to support rule); *Functional Music, Inc. v. Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.), certiorari denied, 361 U.S. 813 (stated justification held not to support rule); cf. *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284. It is wholly immaterial that in *Storer* it was the general order promulgating the rule which was under review, whereas here it is a subsequent order applying the rule. In both cases, it is the validity of the underlying rule, either on its face or as applied, which is at issue; and in both cases the court, in deciding that issue, may review the written views and comments submitted to the Commission in connection with the rule-making proceeding.¹⁰

2. The other objections suggested by the court below are equally without merit. Specifically, there is no basis for the court's conclusion that the Commission's ultimate findings in support of Order Nos. 232, 232A, and 242—that the proscribed price-changing provisions are inconsistent with the “public interest”—are legally insufficient because they were not cast in the language of the statutory standards of “just and reasonable” (Sections 4 and 5) and “public convenience and necessity” (Section 7). Although the particular terminology of Sections 4, 5 and 7 was not used, it is clear that the Commission's findings were

¹⁰ The formal record filed in these cases with the Court of Appeals did not include the written views and comments constituting the record in the rule-making proceedings which culminated in Commission Orders Nos. 232A and 242. Of course, however, the court of appeals was free to take judicial notice of the public record or to require the Commission to produce it.

based upon the appropriate statutory standards. In *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 355, this Court made plain that the validity, or the justness or reasonableness, of a contract depends upon whether it adversely affects the "public interest." See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344, 345; *Mississippi River Fuel Corp. v. Federal Power Commission*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 355 U.S. 904. And in many certificate proceedings, "public interest" has similarly been equated with "public convenience and necessity." See, e.g., *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24, 29, 30; *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 390-391, 392. It should be noted, moreover, that, in issuing rules of general applicability, an administrative agency is required only to give "a concise general statement of their basis and purpose" (Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003 (b)).

Equally wide of the mark is the court's conclusion that the Commission has no power to formulate general substantive rules with respect to provisions of contract. Without doubt, the Commission lacks authority to "make" contracts in the first instance. Nor can it approve, or even accept for filing, proposed rate increases which exceed the levels agreed upon by the parties. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332. As we have already noted, however (*supra*, p. 10), the Commission does have explicit authority to order the modi-

fication of existing contractual provisions which it determines to be inimical to the public interest. We see no reason why, in making that substantive determination, it may not utilize the rule-making procedures contemplated by Section 16 of the Natural Gas Act. See *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194.

3. If allowed to stand, the decision below would virtually emasculate the Commission's power to use its rule-making authority for the formulation of general legal and policy standards. It would require the Commission to deal on an individual basis, in literally hundreds of separate rate and certificate proceedings, with problems which are industry-wide in character and show little, if any, variation from case to case. To require the Commission, for example, to hold an evidentiary hearing and to consider the problems created by indefinite pricing provisions each time an application based on such a provision is submitted to it, would be to insist that a matter readily susceptible of a quasi-legislative disposition must nonetheless be litigated repeatedly—a process, we suggest, which would be without gain but at considerable cost to efficient and predictable regulation.

The importance of preserving to the Commission its power to "legislate interstitially" is well illustrated by the instant regulations outlawing "favored nation," "spiral escalation," and other unlimited price-changing provisions." Experience has shown the Commis-

¹¹ *Two-party favored-nation clauses* provide for rate increases whenever a higher price is paid to any other supplier by the same purchaser. Under a *three-party favored-nation clause*, the price increase is triggered by a higher price paid to any other supplier by any purchaser. *Spiral escalation clauses*

sion that these provisions, which typically call for automatic price increases whenever a higher price is received by another seller in the same general area, have resulted in a flood of simultaneous rate filings which lack any substantial relationship to the economic requirements of the producer, or to other factors bearing upon a determination of the proper rate.

In addition, the interpretation and application of these highly complex clauses has created an administrative problem of formidable proportions. To determine the threshold question whether the proposed rate increase is contractually authorized, *i.e.*, whether it has been "triggered" by a higher rate under another contract, the Commission and its staff are frequently required to undertake intricate and debatable comparisons between the two contracts with respect to countless variables—*e.g.*, quantity and quality of gas, delivery pressures, gathering and compressing arrangements, etc.—before they can embark upon the true regulatory task of determining the just and reasonable rate.

generally provide that in the event the price which the buyer receives for the gas is increased, the price concurrently paid by the buyer to the supplier under the contract shall be increased in proportion to the buyer's increase. *Redetermination clauses* provide that the price currently paid under the contract shall be subject to upward adjustment at certain specified times to reflect the average of the highest prices then paid by buyers to other suppliers for gas delivered under substantially similar terms and conditions. Other similar types of indefinite escalation clauses include bona fide offer type of favored-nation clauses, commodity-index-adjustment clauses, and renegotiation clauses. See *Pure Oil Co.*, 25 FPC 383, 388.

Still another impediment to effective regulation arises from the fact that the precise amount of the contractually permitted price increases may not be ascertainable until the level of the triggering price or prices is finally determined in a Commission rate proceeding involving that price. See, e.g., *Phillips Petroleum Co. v. Federal Power Commission*, 227 F. 2d 470 (C.A. 10), certiorari denied, *sub nom Michigan Wisconsin Pipe Line Co. v. Phillips Petroleum Co.*, 350 U.S. 1005. Thus, if another seller is being paid a higher rate subject to a Commission-imposed obligation to refund in certain contingencies, the amount to which the producer would be contractually entitled for sales on any given date could not be definitively established pending the resolution of the contingencies affecting the other seller. See *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 303-304.

In adopting regulations to alleviate these difficulties, the Commission has given due weight to the legitimate need for pricing flexibility in an industry where contracts customarily extend for periods of 20 years. See, *supra*, pp. 6-7. But there is no occasion at this point to elaborate upon the reasonableness of the particular rules which the Commissioner has adopted. The court below did not reach that issue. The important consideration at this juncture is that the Commission has been held to be without rule-making powers in an area which is surely vital to the performance of its regulatory responsibilities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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AUGUST 1963.

APPENDIX A
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1963

Nos. 6947, 7135, and 7217

TEXACO, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Nos. 6973, 7002, and 7303

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 7179

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL POWER COMMISSION

Alfred C. DeCrane, Jr., and James J. Flood, Jr.
(P. F. Schlicher and P. R. Wimbish were with them
on the briefs), for petitioner, Texaco, Inc., in Nos.
6947, 7135, and 7217.

William H. Emerson and Carroll L. Gilliam (J. P.
Hammond, Thomas J. Files, Harold H. Young, Jr.,
and William J. Grove, and Dow, Lohnes, and Albert-
son, of counsel, were with them on the briefs) for
petitioner, Pan American Petroleum Corporation, in
Nos. 6973, 7002, and 7303.

John A. Ward, III (Phillip D. Endom, Joiner Cartwright, Herf M. Weinert, Charles F. Heidrick, J. Colbert Peurifoy, Robert E. May, Louis Flax, John T. Ketcham and May, Shannon and Morley, and Martin A. Row, of counsel, were with him on the brief), for petitioner, Sun Oil Company, in No. 7179.

Peter H. Schiff, Attorney (Richard A. Solomon, General Counsel, Howard E. Wahrenbrock, Solicitor, and Milton J. Grossman and Arthur H. Fribourg, Attorneys, Federal Power Commission, were with him on the briefs), for respondent, Federal Power Commission.

Before MURRAH, Chief Judge, and BREITENSTEIN and HILL, Circuit Judges

BREITENSTEIN, Circuit Judge.

These seven cases present another episode in the history of the regulation by the Federal Power Commission of independent producers of natural gas subject to its jurisdiction. Basically the issue is the right of the Commission to reject summarily and without a hearing a gas-purchase contract between a producer and a pipeline company on the ground that the contract contains indefinite price-changing clauses forbidden by Commission regulations.

At the outset we are faced, in all but one of the cases, No. 7303, with the Commission's procedural objections to the right of the producers to maintain petitions for review in this court. The insistence of the parties on their procedural rights impels us to resist the temptation to go directly to the heart of the controversy.

The struggles of the Commission to administer the Natural Gas Act so as to regulate producers have been described many times in Commission reports and decisions and in court decisions. We shall review the

situation only to the extent necessary for a background to the phase of the problem with which we are concerned.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 338, 341, the Supreme Court said that the Natural Gas Act¹ did not "abrogate private rate contracts as such" and construed §§ 4 and 5 of the Act² as parts of a statutory scheme under which "all rates are established initially by the natural gas companies." The gas is ordinarily sold in the field by a producer to a pipeline company which transports the gas to the area of use and there sells it to a retailer who makes distribution to the ultimate consumers. The pipelines must have a committed source of gas supply sufficient to justify financing, construction, and operation. That supply is ordinarily obtained by long-term contracts of 20 years or more. The negotiation of a long-term contract presents problems of the continued fairness and adequacy of the original selling price.³ These problems have given rise to price escalation provisions.⁴ We have recognized contractual provisions for price escalation as unabrogated by the Act.⁵

¹ 15 U.S.C. § 717.

² 15 U.S.C. §§ 717c and 717d.

³ Cf. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 113.

⁴ These provisions take many forms such as two-party favored-nation, three-party favored-nation, periodic escalation, redetermination, and spiral escalation. For the purposes of this decision an explanation of the differences is unnecessary except, as will later be discussed, in the differentiation between definite price-changing clauses and indefinite price-changing clauses.

⁵ *Cities Service Gas Producing Company v. Federal Power Commission*, 10 Cir., 233 F. 2d 726, 730, certiorari denied 352 U.S. 911 (adjustments based on "prevailing field price" in a

Within three months after the *Mobile* decision, the Commission gave notice in Docket No. R-153^{*} of a proposed regulation to prohibit the filing of producers' contracts containing either pricing clauses tied to buyers' rates and pricing indices, or favored-nation clauses. This docket lay dormant until March 3, 1961, when the Commission issued its Order No. 232[†] declaring provisions for adjustment in price denoted as "indefinite escalation" clauses to be "inoperative and of no effect at law" in contracts tendered for filing after April 2, 1961. This order was superseded by Order No. 232-A[‡], which added the following to the definition of "rate schedule" as contained in § 154.93 of the regulations:

Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

specific area); *Phillips Petroleum Company v. Federal Power Commission*, 10 Cir., 258 F. 2d 906, 918 (escalations tied to the "weighted average royalty rate" in a defined area); *Kerr-McGee Oil Industries, Inc. v. Federal Power Commission*, 10 Cir., 260 F. 2d 602 (adjustments in ratio to pipeline company's resale rate); *Warren Petroleum Corporation v. Federal Power Commission*, 10 Cir., 282 F. 2d 312 (adjustments under two-party favored-nation clause).

^{*} 21 Fed. Reg. 2388, April 12, 1956.

[†] 25 F.P.C. 379, 26 Fed. Reg. 1983, March 8, 1961.

[‡] 25 F.P.C. 609, 26 Fed. Reg. 2850, April 6, 1961.

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

Hereafter we shall refer to contract provisions permissible under Order No. 232-A as definite price-changing clauses and to those impermissible under that order as indefinite price-changing clauses.

Pursuant to notice given on October 10, 1961, in Docket No. R-203,^{*} the Commission, on February 8, 1962, issued its Order No. 242¹⁰ which made three amendments to the regulations. Section 154.93, defining producers' rate schedules, was amended to prescribe automatic rejection of contracts containing indefinite price-changing clauses. The amendment reads:

Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above [Order No. 232-A] shall be rejected.

Order No. 242 also amended §§ 157.14 and 157.25 of the regulations so as to prohibit the consideration of contracts containing the forbidden clauses in support of a pipeline's application for a certificate of convenience and necessity.

The cases now before us attack the validity of Orders Nos. 232, 232-A, and 242. With this background we turn to the procedural questions.

^{*} 26 Fed. Reg. 9732, October 14, 1961.

¹⁰ 27 F.P.C. 339, 27 Fed. Reg. 1356, February 14, 1962. Rehearings denied 27 F.P.C. 666.

Court review of Commission orders is governed by § 19(b) of the Act,¹¹ which provides that a party to a proceeding "aggrieved" by a Commission order may obtain a review in the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business," or in the Court of Appeals for the District of Columbia Circuit. The Commission asserts that venue does not lie in the Tenth Circuit for consideration of the three petitions of Texaco, Inc., Nos. 6947, 7135, and 7217, because the petitioner is not located in, and does not have its principal place of business in, that circuit. Texaco is incorporated under Delaware law and allegedly has its principal place of business in Texas. Venue in the Tenth Circuit depends on the meaning to be given the word "located."

Texaco's petitions for review allege that its Tulsa Division has responsibility for Texaco's producing activities and operations in an area including Oklahoma and Kansas.¹² The Tulsa Division operations include "the negotiation of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of state reports and the disposition of the production." In each case personnel of the Tulsa Division negotiated the contracts with the pipelines. That division supervises the perform-

¹¹ 15 U.S.C. § 717r(b).

¹² Another of Texaco's seven producing department divisions is headquartered in Denver, Colorado, and has similar responsibilities for an area including Colorado, New Mexico, Utah, and Wyoming, all states of the Tenth Circuit.

ance of the contracts by Texaco, maintains records pertaining thereto, and receives payment for the gas sold. The certificate applications were made by the Tulsa Division.

The Commission asserts that the word "located" as used in § 19(b) means the same as "resides" and refers to the state of incorporation. Oddly enough, the extensive litigation over the Natural Gas Act has not produced an answer to this simple question. Perhaps the reason is that the point concerns venue rather than jurisdiction." The Commission asserts a "long-established understanding" of the Commission and the natural-gas companies that "located" refers to the state of incorporation, and cites an impressive list of cases brought in the Third Circuit on the basis of the incorporation of the natural-gas companies, which were parties thereto, in one of the states of the Third Circuit. Texaco counters with an equally impressive list of cases wherein review was had in a circuit in which the natural-gas company was not incorporated and did not have its principal place of business. As venue may be waived, we are not impressed with this approach.

In a long line of decisions, beginning with *Shaw v. Quincy Mining Company*, 145 U.S. 444, 450, the Supreme Court has held that the residence of a corporation within the meaning of venue statutes is only the state of incorporation. In *Suttle, Administrator v. Reich Bros. Construction Co.*, 333 U.S. 163, 166-167, the Supreme Court reviewed these cases and said that Congress has revealed a similar understanding in the enactment of special venue statutes. The presumption is that Congress was aware of the

¹¹ *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 638.

applicable decisions, and its recognition of them, when it enacted the Natural Gas Act."

The parties agree that the pertinent language of § 19(b) was taken from § 313(b) of the Federal Power Act." The legislative history of that section shows that "is located" was substituted for "resides."¹⁴ The Commission says that there is no explanation of the purpose of the change. In our opinion the change is significant and the deliberate substitution of words shows a congressional intent not to narrow the provision to the state of incorporation. If Congress had so intended, it would have retained the word "resides."

The Commission urges that, unless "is located" is equated with "resides," the insertion of the phrase "principal place of business" is but an exercise in redundancy violative of the rule that all terms of a statute must be given effect. We do not agree. Congress is presumed "to have used language in accordance with the common understanding."¹⁵ "Located"

¹⁴ *Shapiro v. United States*, 335 U.S. 1, 16. Cf. *Public Service Company of New Mexico v. General Electric Company*, 10 Cir., — F. 2d —, decided March 15, 1963; *United States v. Sanders*, 10 Cir., 145 F. 2d 458, 461.

¹⁵ 16 U.S.C. § 825l(b).

¹⁶ The first version of what ultimately developed as § 313(b) of the Federal Power Act (Part III of the Public Utilities Holding Act of 1935, Part III, Act of August 26, 1935, c. 687, § 313(b), 49 Stat. 803, 854, 860, appeared in S. 1725, 74th Cong., 1st Sess. In its briefs the Commission says that this bill provided that a person aggrieved could obtain review of a Commission order in a court of appeals "for any circuit wherein such person resides or has his principal place of business," and that a revised bill, S. 2796, contained the venue provisions now found in § 313(b). The significant modifications are that the reference point for venue is the licensee or public utility rather than the petitioner, and that the words "is located" replace "resides."

¹⁷ *United States v. Wurts*, 303 U.S. 414, 417.

means having physical presence or existence in a place." A corporation has physical presence or existence in the state of incorporation and in a state where it conducts substantial operations. Granting that a corporation is located in the state in which it has its principal place of business, the overlap in provisions must be for the purpose of clarity. The fact of the overlap does not detract from the effect of the substitution of "is located" for "resides." We deem the change in phraseology to be more significant than the overlap.

This conclusion does not intend that the mere legal indicia of "doing business" will support venue under § 19(b). In *Colorado Interstate Gas Co. v. Federal Power Commission*, 10 Cir., 142 F. 2d 943, 950-951,¹⁸ we denied a motion to dismiss and held that the petitioners in that case had their principal places of business in Colorado, saying that the question was one "of fact to be determined in each particular case." The same principle applies here and the question of whether Texaco is located in the Tenth Circuit must be determined on the particular facts. The undenied allegations of Texaco are that it conducts extensive operations in the Tenth Circuit and has two of its seven production divisions therein. More importantly, in each of the cases the gas sold is produced

¹⁸ Webster's New International Dictionary, 2d ed. (1939), Unabridged, defines "locate" as: "1. To designate the site or place of; * * *. 2. a. To set or establish in a particular spot or position; to station. b. To establish in a charge or office. * * *." The word "location" is defined as: "1. Act or process of locating (in various senses); fact or condition of being located, or of having position. * * *."

¹⁹ Affirmed, *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581; affirmed in part, reversed in part on other grounds, *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626.

in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit. As all matters concerned with the applications of Texaco which resulted in the orders here sought to be reviewed took place in the Tenth Circuit, Texaco is located in that circuit for the purpose of the venue provisions of § 19(b).

The Commission has moved to dismiss cases Nos. 6947, 6973, 7002, 7135, and 7179 upon the ground that in each case the petitioner is not "aggrieved" within the requirement of § 19(b). The facts in these cases divide them into two groups which must be considered separately.

In the first group are cases Nos. 7002 and 7179.²⁰ Each of these seeks to review and set aside Order No. 242. That order was issued as a rule of general applicability and amended certain sections of the regulations.

In moving to dismiss these cases the Commission asserts that the Act vests no jurisdiction in the courts of appeals to review orders of the Commission amending its general rules and regulations. The petitioners counter by saying that reviewability is predicated on an invasion of legal rights and that such rights of the petitioners are directly affected by Order No. 242.

The Tenth Circuit is committed to the view that § 10 of the Administrative Procedures Act²¹ is inapplicable to the review of Commission orders under

²⁰ No. 7179—*Sun Oil Company v. Federal Power Commission*—was originally filed in the Court of Appeals for the District of Columbia Circuit and was transferred to the Tenth Circuit pursuant to the provisions of 28 U.S.C. § 2112 because of the earlier petition filed in the Tenth Circuit by Pan American in No. 7002.

²¹ 5 U.S.C. § 1009.

the Natural Gas Act.²² Accordingly, the right of review is governed entirely by § 19(b) of the Natural Gas Act. That section permits review on the petition of a party aggrieved. The query is when, and in what circumstances, is a party aggrieved.

Sales of gas by producers to pipelines are initiated by private contract and those contracts are subject to review by the Commission under statutory standards. No right exists in the seller to change a rate fixed by contract unless the contract itself recognizes a right to change the rate. An order of the Commission proscribing price-changing provisions is an interference with the right to contract and a denial of a substantive right. Without considering for the moment the question of the power of the Commission to interfere with such a substantive right, those to whom the right is denied are entitled to court review of such action to test whether the action is within the statutory powers of the Commission. The problem is how this review may be had under § 19(b).

An easy and quick method of reviewing orders which affect substantive rights and which are of general applicability would aid the administration of the Act. The difficulty is that the Commission has construed § 19(b) so as to preclude any such expeditious review and the position of the Commission has been quite uniformly upheld by the courts.

In seeking reviews of orders of general applicability the petitioners rely on the decisions in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, and *United States v. Storer Broadcasting Co.*, 351 U.S. 192, in which rules of general applicability affecting substantial rights were held reviewable under other statutes. The courts of appeals have not

²² *Amerada Petroleum Corporation v. Federal Power Commission*, 10 Cir., 231 F. 2d 461, 465.

applied these decisions in determining rights to review under § 19(b). Without going into the distinctions and differences which have been stated, the controlling point has been that a person is not aggrieved by a general order and cannot complain until a personal right is impinged by a special order. The Tenth Circuit, in *Amerada Petroleum Corporation v. Federal Power Commission*, 10 Cir., 231 F. 2d 461, declined to review orders issuing rules after the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672. In so holding it relied heavily on *United Gas Pipe Line Co. v. Federal Power Commission*, D.C. Cir., 181 F. 2d 796, certiorari denied 340 U.S. 827, and that court's treatment of the *Columbia Broadcasting* case. More recently, the Fifth Circuit has sustained Commission motions to dismiss petitions seeking to review Order No. 232-A²³ and to review Order No. 242.²⁴ We accept these decisions as correct applications of § 19(b). Certainly the language of the statute is strained if review may be had of a negative order of general applicability by a party who has not been, and may never be, affected by the order except in a theoretical manner. Accordingly, Nos. 7002 and 7179 must be dismissed on the ground that the petitioners are not aggrieved within the meaning of § 19(b).

The second group of cases attacks special orders made under the authority of the mentioned general orders. In each instance the questioned decisions have granted the authority sought but provide that any

²³ *Sun Oil Company v. Federal Power Commission*, 5 Cir., 304 F. 2d 293, certiorari denied 371 U.S. 861.

²⁴ *Hunt Oil Company v. Federal Power Commission*, 5 Cir., 306 F. 2d 878. The Third Circuit took similar action in an unreported case, *Shell Oil Company v. Federal Power Commission*, case No. 14058, decided July 17, 1962.

application for a rate change under an impermissible price-changing clause will be rejected.

Nos. 6947, 6973, and 7135 concern applications for certificates of convenience and necessity covering gas sales by producers to pipelines. In Nos. 6947 and 7135 the same contract is presented, one for the sale by Texaco to Lone Star Gas Company of gas produced in the Carter-Knox Field, Stephens County, Oklahoma. In No. 6973 the sale is by Pan American to Mountain Fuel Supply Company of gas from the Middle Mountain Unit Area, Sweetwater County, Wyoming. Each contract was made or amended after the effective date of Order No. 232-A and contains indefinite price-changing clauses. The Commission granted temporary authorizations in Nos. 6947 and 6973. A permanent certificate was granted in No. 7135 for the same service as that presented in No. 6947.

In each of the three cases the order of the Commission contains this provision in substantially identical language:

Further, in the event that any of the documents comprising the listed rate schedules and supplements was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

The petitions for review in these cases are directed against the quoted provision of the respective orders. The Commission has moved to dismiss each on the ground that the petitioner is not a party aggrieved. On the one hand the petitioners say that Order No.

232-A, as implemented by the orders containing the provision in question, has effectively nullified indefinite price-changing clauses and thus deprived petitioners of contract rights assured to them by the Act and by the *Mobile* decision. On the other hand the Commission urges that the orders sought to be reviewed in these cases do not themselves adversely affect the petitioners but only affect their rights adversely on the contingency of future administrative action.

In *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 10 Cir., 270 F. 2d 404, 407, the Tenth Circuit dismissed, on Commission motion, a petition to review a Commission order authorizing temporary service and providing that service once instituted could not be discontinued without Commission permission. Objection was made to the provision for termination of service. The dismissal was on the ground that the petitioner had not sought to terminate and, hence, was not aggrieved.²⁵ In *Sun Oil Company v. Federal Power Commission*, 5 Cir., 304 F. 2d 290, certiorari denied 371 U.S. 861, the Fifth Circuit was confronted with a situation comparable to the one here presented. Objection was made to the inclusion in an authorization for temporary service of a provision, similar to that appearing in Nos. 6947, 6973, and 7135, for the rejection of rate increases covered by impermissible price-changing clauses. The court sustained the Commission motion to dismiss saying that the clause attacked was interlocutory and not reviewable.

²⁵ The court, quoting from *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 130, said: " * * * the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action."

We conclude that the provisions of the orders attacked in Nos. 6947, 6973, and 7135 do not adversely affect any right of the petitioners and, hence, the petitioners are not aggrieved within the requirement of § 19(b). That conclusion does not mean that Orders Nos. 232, 232-A, and 242 are valid or that contracts executed after the effective date of those orders are "inoperative" or "of no effect at law" when they contain indefinite price-changing clauses.

This brings us to No. 7303, in which the Commission has interposed no procedural objections to the petition for review, and to No. 7217 in which we hold that the motion to dismiss must be denied. In each of these the Commission rejected an application for a certificate of convenience and necessity on the ground that the underlying contract contained pricing provisions not permissible under § 154.93, as amended by Order No. 232-A.²⁶ The rejection was based on Order No. 242. As we have heretofore stated, that order provides for the rejection of applications for certificates when the underlying contract contains price-changing clauses forbidden by Order No. 232-A.

Our difficulty is immediately apparent. The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject

²⁶ No. 7217 relates to an application by Texaco for a certificate covering a sale by it to Natural Gas Pipeline Company of America of gas produced in the Camrick Southeast Field, Beaver County, Oklahoma. The application in No. 7303 is based on a contract for the sale by Pan American to Colorado Interstate Gas Company of gas produced in the Beaver Creek Field, Fremont County, Wyoming. Each contract contains indefinite price-changing clauses.

to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question—the propriety of indefinite price-changing clauses.

Neither sympathy for the administrative difficulties of the Commission nor recognition of its expertise in the regulation of those subject to the Natural Gas Act justifies disregard of the statutes under which the Commission operates. We find no statutory authorization for the Commission actions here attacked.

Section 16 of the Act¹⁷ empowers the Commission to make rules and regulations to carry out the provisions of the Act but that section is not a source of power to regulate in conflict with substantive provisions of the Act.¹⁸ The Commission asserts that the necessary authority flows from §§ 4, 5, and 7.¹⁹

Sections 4 and 5 relate to rates and charges and gives the Commission power to modify contracts—not to make contracts. The power to modify can be exercised only after hearing. The controlling standard is what is just and reasonable.²⁰

¹⁷ 15 U.S.C. § 717c.

¹⁸ Cf. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 468, 508. See also *Willmut Gas & Oil Company v. Federal Power Commission*, D.C. Cir., 294 F. 2d 945, 250, certiorari denied 368 U.S. 975, saying that § 16 does not permit the Commission to promulgate rules inconsistent with the Act and thus result in a legislative change.

¹⁹ 15 U.S.C. §§ 717c, 717d, and 717f.

²⁰ Section 4, subparagraph (a), provides that all rates and changes must be just and reasonable. Subparagraph (c) requires the filing of schedules showing all rates and charges "together with all contracts which in any manner affect or relate to such rates, charges," Subparagraph (d) forbids a change in a rate or charge without 30-days' notice to the Commission. Subparagraph (e) provides that when a new rate schedule is filed, the Commission, either on complaint or on its own initiative, but on reasonable notice may "enter upon

Section 7(c) provides that no natural-gas company "shall engage in the transportation or sale of natural gas" without a certificate of public convenience and necessity and with immaterial exceptions requires the Commission to set "for hearing" applications to obtain such certificates. Section 7(e) states that the certificate will issue if the Commission finds that the proposed service "is or will be required by the present or future public convenience and necessity."

The Commission held no hearings relative to the promulgation of Orders Nos. 232, 232-A, or 242. Nevertheless, the Commission made findings allegedly justifying such orders.¹¹ In summary the Commission found that indefinite price-changing clauses are "undesirable, unnecessary and incompatible with the public interest;"¹² that such contract provisions "have resulted in a flood of almost simultaneous filings" which "bear no apparent relationship to the economic

a hearing concerning the lawfulness" thereof; that the Commission may suspend a new schedule for five months; that "after full hearings, * * * the Commission may make such orders with reference thereto as would be proper" in a § 5 proceeding; and that if the proceedings have not been concluded and an order entered at the end of the suspension period, the proposed change shall go into effect but the Commission may require a bond for refund of overpayments.

So far as material, § 5 provides that when the Commission, "after a hearing," on its own motion or on complaint, finds that a "rate, charge, or classification" or "any rule, regulation, practice, or contract" having an effect thereon, is "unjust, unreasonable, unduly discriminatory, or preferential," the Commission shall determine and fix by order "the just and reasonable rate, charge, classification, rule, regulation, practice, or contract."

¹¹ These findings are reported for Order No. 232, at 25 F.P.C. 380, 26 Fed. Reg. 1983; for Order No. 232-A at 25 F.P.C. 609, 26 Fed. Reg. 2850; and for Order No. 242 at 27 F.P.C. 339-340, 27 Fed. Reg. 1356.

¹² 25 F.P.C. 380, 26 Fed. Reg. 1983.

requirements of the producers who file them;" and that such filings "have created a significant portion of the administrative burdens under which this Commission is laboring today."²³

These findings are not made in the language of the statutory standards of "just and reasonable" and "public convenience and necessity." The public interest must be related to and tested by these standards. Although the Commission is the guardian of the public interest in the administration of the Act, the Commission may not substitute its standards for the statutory standards. Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them.²⁴ In the cases at bar the Commission has held no adversary hearings at which facts have been adduced to sustain findings which, on the basis of statutory standards, support the decisions reached. No amount of administrative expertise can supply these deficiencies.

The Commission vigorously asserts the validity of Orders Nos. 232, 232-A, and 242 as orders of general application within Commission power which are desirable and preferable to a case-by-case approach to the regulatory problems. At the same time the Commission with equal vigor says that the orders are

²³ 27 F.P.C. 340, 27 Fed. Reg. 1357.

²⁴ The Commission's reliance on its decision in the case of *The Pure Oil Company*, 25 F.P.C. 383, is not helpful. The Commission there held that indefinite escalation provisions are, in general, contrary to the public interest. The Commission order was affirmed on review, *Pure Oil Company v. Federal Power Commission*, 7 Cir., 299 F. 2d 370, but the court did not discuss the problems with which we are concerned. In any event a record made in that proceeding is not dispositive of the issues now under consideration.

reviewable only on a case-by-case basis after rejection of a particular contract containing clauses impermissible under the general orders. Such a divided approach to a basic and difficult problem cannot throw a cloak of conclusive validity over general orders. If general orders are not themselves reviewable and if special orders based thereon are not reviewable when the result falls short of the denial of a presently asserted substantive right, then those general orders are only of an advisory nature and neither forbid the inclusion in contracts of indefinite price-changing clauses nor justify the rejection, on the sole ground of violation of general regulations, of contracts containing such clauses.

The Commission argues that in making the challenged orders it was "legislating interstitially, as contemplated by the Act." Although the "filling in the interstices of the Act" may be performed through a "quasi-legislative promulgations of rules,"¹¹ administrative officers must keep within the bounds of their administrative powers,¹² which are limited by the scope of the statute.¹³ In *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-618, the Supreme Court said:

* * * not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. * * * For

¹¹ *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 202.

¹² *American Telephone & Telegraph Co. v. United States*, 290 U.S. 232, 236.

¹³ *Federal Communications Commission v. American Broadcasting Co., Inc.*, 347 U.S. 284, 290.

the ultimate question is what has Congress commanded * * *

Under the Natural Gas Act and the *Mobile* decision, rates and charges for the sale of gas are initially prescribed by private contract and may be increased only in accordance with contract provisions. Contracts establishing such rates and charges and providing for changes therein may be modified by the Commission only after hearing and then only by the application of the standards of "just and reasonable" and "public convenience and necessity." The summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review.

Perhaps in some regards the Commission may "legislate interstitially" but in our opinion it may not do so when its action results in the denial of substantive rights. The horrendous consequences of such actions are well described in *Hunt v. Federal Power Commissions*, 5 Cir., 306 F. 2d 334, 342-345, and need not be repeated here. Within its constitutional powers Congress may legislate on substantive rights without hearings and findings. The Commission has attempted to usurp that congressional power. No claim of administrative need or of frustration in the performance of its duties can make up for the lack of statutory authority.

We are deciding only the cases before us. The problems of area pricing are not presented here. In our opinion Order No. 242 is void and without effect. Orders Nos. 232 and 232-A are in a different category. As advisory declarations of Commission policy they determine no rights. At the same time those

orders do not, and cannot, invalidate either retroactively or prospectively price-changing clauses in a gas-sale contract between a producer and a pipeline and are no justification for the rejection, without hearing, of a rate or charge based on such clauses.

For the reasons stated the motions to dismiss Nos. 6947, 6973, 7002, 7135, and 7179 are sustained and those cases are dismissed. The motion to dismiss No. 7217 is denied. The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in this opinion.

APPENDIX B

JUDGMENT

Fifth Day, May Term, Monday, May 20th, 1963

**Before Honorable Alfred P. Murrah, Chief Judge,
and Honorable Jean S. Breitenstein and Honorable
Delmas C. Hill, Circuit Judges.**

**These causes came on to be heard and were argued
by counsel.**

**On consideration whereof, for the reasons stated in
the opinion of this court, the motions to dismiss cases
Nos. 6947, 6973, 7002, 7135 and 7179 are sustained
and these cases are dismissed out of this court.**

The motion to dismiss case No. 7217 is denied.

**The orders of the Commission in Nos. 7217 and
7303 are set aside and held for naught and the cases
are remanded for further consideration in accord-
ance with the views expressed in the opinion of the
court.**

APPENDIX C

1. The Administrative Procedure Act, Section 4, 60 Stat. 238, 5 U.S.C. 1003, provides as follows:

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) **NOTICE.**—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **PROCEDURES.**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any

manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) **PETITIONS.**—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other

respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or

formal pleading by the natural-gas company, but upon reasonable notice; to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall

give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717e]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717 d(a)]

SEC. 7 * * *

(c) ^(*) No natural-gas company or person which will be a natural-gas company upon com-

^(*) Subsection 7 (c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

pletion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a cer-

tificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be

filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

SEC. 19 * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction,

which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new finding, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r]

3. The rules and regulations of the Federal Power Commission, as amended, 18 C.F.R. (Cum. Supp. 1963), provide in pertinent part as follows:

Section 1.7 * * *

(b) *For issuance, amendment, waiver, or repeal of rules.* A petition for the issuance,

amendment, waiver, or repeal of a rule by the Commission shall set forth clearly and concisely petitioner's interest in the subject matter, the specific rule, amendment, waiver, or repeal requested, and cite by appropriate reference the statutory provision or other authority therefor. If a rate filing is accompanied by a request for waiver pursuant to this section the thirty-day notice period provided in section 4(d) of the Natural Gas Act and section 205(d) of the Federal Power Act shall begin to run if and when the Commission grants the request. Such petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, such rule, amendment, waiver, or repeal, and shall conform to the requirements of §§ 1.15 and 1.16. Petitions for the issuance or amendment of a rule shall incorporate the proposed rule or amendment.

* * *

Section 154.93 Rate schedule [for independent producers] defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes, levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

* * * * *

Section 157.14 [relates to pipeline application]
Exhibits.

(a) *To be attached to each application.* * * * all exhibits specified shall accompany each application when tendered for filing.

* * * * *

(10) *Exhibit H—Total gas supply data.* A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:

* * * * *

(v) A conformed copy of each gas purchase contract upon which applicant proposes to rely: * * * *Provided further, however*, That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains

any price-changing provision other than those defined as permissible in § 154.93 of this chapter. * * *

Section 157.25 Necessary exhibits.

There shall be filed with the application [of a producer] as a part thereof the following exhibits:

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24 (b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.

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FILED

SEP 11 1963

JOHN F. DAVIS, CLERK

No. 386

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION,

Petitioner,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM OF CONCURRENCE OF TEXACO INC.

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MEMORANDUM OF CONCURRENCE OF TEXACO INC.

On August 19, 1963, Petition for Writ of Certiorari was filed seeking review of judgment of the Court of Appeals for the Tenth Circuit, entered May 29, 1963, in *Texaco Inc., et al. v. Federal Power Commission*, 317 F. 2d 796 (Pet. App. 21-41). By its decision, the Tenth Circuit set aside certain orders of petitioner after finding that the acts complained of were undertaken "without statutory authorization."

Texaco would have opposed the issuance of certiorari on the grounds originally advanced by petitioner, urging that the decision below is perfectly consistent with the pertinent decisions of this Court, of which *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, and *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, are but two. Texaco would further urge that Sections 5, 7, and 8 of the Administrative Procedure Act, 5 U.S.C. 1004, 1006 and 1007, are pertinent to the issues involved in these matters, in addition to the statutes and regulations cited by petitioner, and Texaco continues to assert that "Reasons for Granting the Writ," as advanced by petitioner (Pet., pp. 10-19) are not such as to warrant the relief sought.

However, on August 26, 1963, the Court of Appeals for the Ninth Circuit entered its decision in *The Superior Oil Company v. Federal Power Commission*, ... F.2d ..., No. 18252. The Ninth Circuit has stated:

"We are mindful of the fact that the Tenth Circuit has held Order No. 242 void and without effect. *Pan American Petroleum Corp. v. Federal Power Commission*, 10 Cir., 317 F. 2d 796, decided May 20, 1963. 30 ... we respectfully decline to follow the *Pan American* decision." (mimeo, p. 23, footnote omitted.)

Thus, while Texaco directly disputes that the reasons originally advanced by petitioner are proper grounds for issuance of a writ of certiorari, Texaco does recognize that this stated conflict between the decision of the Tenth Circuit in the instant matter and the decision of another circuit on the same question of federal law is proper and sufficient grounds for issuance of a writ of certiorari. Texaco concurs

that under this Court's Rule 19, a writ of certiorari should be issued.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, PETITIONER

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM OF PETITIONER

The Federal Power Commission's petition for certiorari referred to a case presenting the same question, (*Superior Oil Co. v. Federal Power Commission*, C.A. 9 No. 18252), then pending before the United States Court of Appeals for the Ninth Circuit. On August 26, the Ninth Circuit handed down its decision in that case. In contrast to the court below, which set aside the application of the Commission's indefinite-pricing rule, the Ninth Circuit has unanimously affirmed the Commission. Its opinion is reproduced in the Appendix hereto, *infra*, pp. 3-43.

The Ninth Circuit's opinion expressly notes the holding of the court below that the substantive powers conferred by the rate and certificate actions of the

Gas Act may not be exercised through an exercise of the rule-making power. Stating, however, that it regards this Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, as controlling on this point, the Ninth Circuit expressly declines to follow the court below and upholds Order 242 as a valid exercise of the Commission's rule-making power. App., *infra*, p. 27. Compare Pet. 11-15.

Expressly rejecting, also, the Tenth Circuit's view that the absence of a hearing would circumvent court review by depriving the court of a record, the Ninth Circuit points out that this reasoning would make it necessary for all general rule-making to be based upon a trial-type hearing. App., *infra*, p. 37. Compare Pet. 17-19.

The opinion of the Ninth Circuit (unlike the opinion below) goes on to examine the specific objections which had been urged against the particular rule, and the adequacy of the Commission's findings and supporting reasons. It concludes that "the Commission had a reasonable basis for proscribing price-changing provisions of the kind before us, and the determination to do so was not arbitrary and capricious." App., *infra*, pp. 37-43.

The appended decision thus confirms the existence of conflict between the decision below and *Storer*, and at the same time itself establishes a clear conflict among the circuits.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

SEPTEMBER 1963.

APPENDIX

In the United States Court of Appeals for the Ninth Circuit

No. 18,252

THE SUPERIOR OIL COMPANY, PETITIONER,
v.

FEDERAL POWER COMMISSION, RESPONDENT.

*On Petition To Review Order of the Federal Power
Commission*

August 26, 1963

Before: POPE, HAMLEY and BROWNING, *Circuit Judges*
HAMLEY, *Circuit Judge*:

This is a proceeding to review the action of the Federal Power Commission in rejecting, without hearing, certain rate-schedule and certificate-application filings. The filings had been tendered by petitioner, The Superior Oil Company (Superior). Superior is an independent producer of natural gas and is subject to Commission regulation under the Natural Gas Act (Act) 15 U.S.C. § 717. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672.

On April 9, 1962, Superior entered into a casing-head gas contract with the El Paso Natural Gas Company (El Paso) covering the sale of casinghead gas produced in approximately 2,640 acres of gas in the Aneth Field in southeastern Utah. This contract incorporates by reference the terms of a twenty-year casinghead gas contract entered into on June

11, 1958, by the same parties. This 1958 contract initially committed some 8,720 acres in the Aneth Field to El Paso,¹ but by subsequent agreements sections of 800 acres² and 2,560 acres³ had been added

¹ On June 25 and July 7, 1958, Superior filed this 1958 contract with the Commission as its rate schedule No. 77, and in support of its application for a certificate of public convenience and necessity. Temporary authority to deliver this gas was granted by the Commission on November 18, 1958. On February 23, 1960, the Commission issued its Opinion No. 335, granting the certificate of public convenience and necessity applied for, but upon condition that the rate should be 17.7 cents per Mcf instead of 20 cents per Mcf, as proposed by Superior. *Superior Oil Co.*, 23 F.P.C. 370, *aff'd sub. nom.*, *Texaco Inc. v. Federal Power Comm'n*, 5 Cir., 290 F. 2d 149. In order to comply with the order, Superior filed its supplement No. 7 to rate schedule No. 77, reducing the initial price to 17.7 cents. This supplement was accepted by the Commission on September 22, 1961.

² On February 17, 1960, Superior filed its second supplement to its original application and its supplement No. 4 to its rate schedule No. 77, to which was attached a supplemental casinghead gas contract between Superior and El Paso, dated December 30, 1959. Temporary authority to deliver from this additional 800 acres was granted by the Commission on May 19, 1960, such grant being modified on June 29, 1960.

³ On June 7, 1960 Superior and El Paso entered into a second supplemental casinghead gas contract under which the original contract was amended and supplemented by the addition of approximately 2,560 acres of land to that previously covered. On July 20, 1960, Superior filed this supplemental contract as part of its supplement No. 5 to rate schedule No. 77, and its third supplement to the application for a certificate. Temporary authority to deliver this additional gas was granted by the Commission on September 21, 1960.

An additional supplemental casinghead gas contract, entered into between Superior and El Paso on January 1, 1961, the filings on which were accepted by the Commission on February 6, 1961, resulted in the deletion from the lands covered by the original contract of approximately 1,040 acres as to which title had been lost by litigation.

to the contract. Nothing in the 1958 contract, which was in form amended by the 1962 contract, required or expressly permitted Superior to add acreage to that originally listed.

Among the terms incorporated in the 1962 contract by reference to the 1958 contract were certain price escalation clauses. One of these, not objected to by the Commission, called for specified price increases at five-year intervals.⁴ Another provided for a price "redetermination" by the contracting parties, if requested by the seller, at each of these five year intervals.⁵ A third escalation provision was a so-called favored-nation clause, wherein El Paso agreed

⁴ The pricing terms of the original 1958 contract, adopted for the new acreage by the 1962 agreement called for an initial price of 20 cents per Mcf for the first five years commencing with the date of initial delivery under the original contract. It provided for a price of 21 cents per Mcf for the second five-year period, 22 cents per Mcf for the third five-year period, 23 cents per Mcf for the fourth five-year period, and 24 cents per Mcf thereafter if the contract remained in effect. The initial price was reduced to 17.7 cents per Mcf, in accordance with the condition attached to the certificate issued by the Commission for sale under the 1958 contract, as stated in note 1.

⁵ The price redetermination clause provides specifically:

"Seller shall have the right, at its option, to request a redetermination of the price provided in Section 7 of this Article to be paid for any one or more or all (but not part) of the periods set out in (b), (c), (d) and (e) above. Any such request made with respect to any of such periods shall be made in writing during the six (6) months immediately preceding the commencement of such period. If Seller shall make any such request, representatives of Buyer and Seller shall promptly meet and attempt to determine the then reasonable market price of the gas deliverable hereunder. In making such determination, consideration shall be given to all pertinent factors. The price so determined by Buyer and Seller shall be the price applicable during the entire period with respect to which the same was

that it would never pay Superior less than the prices it was paying "others for comparable gas delivered under comparable conditions" within a specified area.⁶

On May 25, 1962, Superior applied to the Commission for an amendment to its certificate of public convenience and necessity for the purpose of authorizing it to sell gas to El Paso pursuant to the 1962 agreement. At the same time Superior made the related rate filing which would make the rate schedules then in effect, including the existing price escalation clauses described above, applicable to gas sold from the additional acreage.⁷

By letter-order dated June 15, 1962, the Commission summarily rejected, without hearing, the May 25, 1962 filings. In this order it was recited that the supplemental agreement of April 9, 1962, in effect incorporates by reference the terms of the contract of June 11, 1958, and therefore appears to incorporate pricing provisions other than those permitted by section 154.93 of the Commission's Regulations (18 C.F.R. [Cum. Supp. 1963] § 154.93).⁸ Therefore, the

determined; provided, that if such price shall be less than the price provided in Section 7 of this Article with respect to such period, the price during such period shall be as provided in Section 7."

⁶ The favored-nation clause provides:

"Buyer agrees that the price to be paid from time to time to Seller hereunder for Residue Gas shall never be less than the price being paid by Buyer to others for comparable gas delivered under comparable conditions within the area shown on Exhibit 'B' attached hereto."

⁷ This latter filing was denominated Superior supplement No. 8 to its gas rate schedule No. 77.

⁸ Section 154.93 of the regulations, entitled "Rate schedule defined," provides in part:

"*Provided*, That in contracts executed on or after April 3, 1962, for the sale or transportation of natural gas subject

Commission stated in this order, the proposed rate schedule supplement and related petition to amend, were rejected "in accordance with Commission Order No. 242 * * * and section 154.100 of the Commission's Regulations * * *". See 18 C.F.R. § 154.100.

to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

"(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

"(b) Provisions that change a price to a specific amount at a definite date; and

"(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question; *Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected."

* Order No. 242, 27 F.P.C. 339, issued on February 8, 1962, promulgated the last-quoted proviso of section 154.03, and amended two other sections of the Commission's regulations; as follows (27 F.P.C. at 341):

"§ 157.14(a) (10) *Exhibit II—Total Gas Supply Data* (v), is amended by adding a proviso at the end thereof to read:

"*Provided, further, however*, That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains

On July 9, 1962, Superior filed an application for reconsideration of the rejected supplement to the rate schedule, complaining that the summary rejection of its certificate application and related rate schedule filing was invalid. Superior did not contend that its contract did not contain price-changing provisions proscribed by the regulations relied upon by the Commission. Nor did the company make any request for a waiver of the regulations as to this sale.¹⁰

Since the Commission did not act on the application for reconsideration, it was denied by operation of law on August 8, 1962.¹¹ This petition for review followed.

Under the existing regulations, referred to above, there being no request for an amendment, waiver or repeal thereof, and no contention that the rejected filings did not contain price-changing provisions proscribed thereunder, the Commission was required to summarily reject the filings without hearing. It

any price-changing provisions other than those defined as permissible in § 154.93 hereof."

"§ 157.25 *Necessary Exhibits. Exhibit B, Contracts.* is amended by deleting all the language after the first sentence thereof, ending with the words 'Natural Gas Act', and inserting in lieu thereof the following:

"On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 hereof."

Section 154.100 of the Commission's regulations reads:

"The Commission reserves the right to reject any rate schedule or material submitted for filing which fails to comply with the requirements of §§ 154.92 through 154.99."

¹⁰ Section 1.7 (a) and (b) of the Commission's regulations (18 C.F.R. 1.7 (a) and (b)) provide procedures whereby an amendment, waiver, or repeal of the Commission's regulations may be sought.

¹¹ See section 19(a) of the Act, 15 U.S.C. § 717r.

follows that the only real issue presented on this review is the validity of the regulations pursuant to which summary rejection was ordered.

As a basis for discussing Superior's attack upon these regulations it will be helpful to set out in detail their procedural history.

They had their inception in rule-making proceedings instituted in 1956. In the notice of this proposed rule-making, the Commission stated that it proposed to amend section 154.93 of its General Rules and Regulations (18 C.F.R. § 154.93) relating to the filing of rate schedules by independent producers, to describe certain types of contracts for the sale of natural gas which would not be accepted for filing as rate schedules.

The Commission's specific proposal was that it would not accept for filing contracts containing provisions calling for price adjustments stemming from:

"(a) escalation clauses based on price indices or changes in the price received by the purchaser upon resale, or (b) the payment or offer of payment of higher prices by the purchaser or other purchasers in the same or other producing areas to the same or other sellers."

21. Fed. Reg. 2389 (1956)

The Commission, in its notice, invited comments on or before June 1, 1956, and stated that it would not act prior to that date. Numerous responses were received by the Commission, including a protest from Superior. No further public action was taken in this rule-making proceeding until March, 1961. The record does not disclose the reason for the delay.

On March 3, 1961, *Pure Oil Co.*, 25 F.P.C. 383, was decided in which it was held, among other things, that, for a number of stated reasons, the two-party favored-nation clauses in Pure Oil Company's contract with

El Paso, and indefinite escalation clauses generally, are contrary to the public interest."¹²

In its *Pure Oil* decision the Commission concluded that it could not strike, as void or voidable, such clauses from Pure Oil Company's existing contracts. But the Commission announced its purpose to deal with the problem by issuing, for future application, regulations in appropriate Commission proceedings, including the rule-making proceedings which had been instituted in 1956.

In keeping with this announcement in the *Pure Oil* decision, the Commission on March 3, 1961, which was the day on which that decision was issued, filed its Order No. 232, in the rule-making proceeding (25 F.P.C. 379). After reciting the history of the rule-making proceeding, the Commission made certain general findings followed by several decretal provisions. These provisions added to the definitions contained in section 154.91(a) of the Commission's General Rules and Regulations (18 C.F.R. § 154.91(a)), definitions of the terms "definite escalation clause," and "indefinite escalation clause," and added a proviso at the end of section 154.93, *Rate schedule defined*. The result was to declare inoperative, and of no effect at law, indefinite escalation clauses, as defined, contained in contracts tendered for filing on and after April 3, 1961.

Order No. 232 provided that any interested party might submit to the Commission, on or before March

¹² This Commission decision was affirmed. *Pure Oil Co. v. Federal Power Comm'n.* 7 Cir., 299 F.2d 370. Indefinite escalation clauses generally include, in addition to two-party favored-nation clauses of the kind included in the Pure Oil Company contract, three-party favored-nation clauses, periodic escalation clauses, redetermination clauses, spiral escalation clauses, and other similar types of clauses. These various kinds of clauses are defined in *Pure Oil Co.*, 25 F.P.C. 383, 388, note 3.

20, 1961, views or comments in writing concerning these rule amendments. Interested persons did submit views and comments in response to this invitation, although none were filed by Superior. On March 31, 1961, upon consideration of these comments, and upon its own further consideration, the Commission issued its Order No. 232 A, modifying the amendments promulgated by Order No. 232 (25 F.P.C. 609).

In Order No. 232 A, the Commission reaffirmed the findings contained in its Order No. 232, that the use of long-term contracts for the sale of natural gas by producers to pipelines or to others is desirable and appropriate in the public interest but that indefinite escalation provisions are, in general, contrary to the public interest. The Commission stated, however, that it appears that elimination of all indefinite escalation provisions, as accomplished by Order No. 232, would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. The Commission therefore concluded that, to allow for pricing flexibility and to provide an incentive for long-term contracts, it should permit future contracts to contain limited price-redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to the Commission's jurisdiction.

Giving effect to this change of view, the Commission amended the findings contained in Order No. 232 pertaining to indefinite escalation clauses and the need of regulations governing such clauses. It also withdrew from section 154.91(a) the definitions of "definite escalation clause," and "indefinite escalation clause," which Order No. 232 had added to its regulations, and amended the proviso which that order

had added to section 154.93, *Rate schedule defined*, to read in pertinent part as set out in the margin.¹³

The result was that, effective as to contracts for the sale or transportation of natural gas executed on or after April 3, 1961, all price changing provisions were determined in advance to be inoperative and of no effect at law, except those falling within the three numbered clauses specified in the proviso, quoted in note 13.¹⁴

¹³ "Provided, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

"(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

"(2) provisions that change a price to a specific amount at a definite date; and

"(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, and not in issue in suspension or certificate proceedings, and are in the area of the price in question."

¹⁴ Sun Oil Company thereafter filed with the Commission an application for a rehearing with regard to Orders Nos. 232 and 232 A. The application was rejected by the Commission and Sun Oil Company filed a petition for review in the Fifth Circuit Court of Appeals. That court dismissed the application, holding that Orders Nos. 232 and 232 A are not determinative of status, do not adjudicate rights or obligations nor direct the taking or refraining from any particular action, and are therefore not subject to review under the Act. *Sun Oil Co. v. Federal Power Comm'n*, 5 Cir., 304 F. 2d 293, 294, cert. denied, 371 U.S. 861.

On October 10, 1961, the Commission initiated new rule-making proceedings. In its notice to interested persons, including natural gas companies, the Commission noted the amendment of section 154.93 of its regulations accomplished by Order 232 A, and then stated:

"Having found in Order No. 232 A that indefinite escalation provisions * * * are generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies * * * it appears that no useful purpose can be served by the Commission's acceptance of contracts containing indefinite price escalation provisions or of applications relying upon contracts having such provisions as proof of the applicants' gas supply."

26 Fed. Reg. 9732, 1961.

The specific amendments proposed, as set out in this notice were substantially the same as those eventually adopted in Order No. 242, described below. The Commission, in its notice, invited comments on or before November 13, 1961. Numerous responses were received, both in support of, and in opposition to, the proposed amendments. Superior filed a timely comment in which it took the position that the proposed amendments are unlawful and exceed the powers granted to the Commission under the Act; contrary to the public interest; unnecessary; prematurely proposed; and arbitrary, unreasonable and discriminatory.

In this rule-making proceeding the Commission, on February 8, 1962, issued Order No. 242 (27 F.P.C. 339). In that order the Commission promulgated certain amendments to its regulations providing for: (1) the rejection of contracts containing indefinite price escalation clauses (now called "price-changing

provisions") of the kind outlined in Order No. 232 A, (2) the rejection of applications for certificates of public convenience and necessity relying for a gas supply upon contracts containing such indefinite escalation provisions, and (3) the Commission's refusal to consider such contracts submitted in support of certificate applications by pipeline companies."

In promulgating these amendments the Commission purported to act pursuant to authority granted by the Act, and particularly sections 4, 5, 7 and 16 thereof, (15 U.S.C. §§ 717c, 717d, 717f and 717o). See 27 F.P.C. 339. In Order No. 242, the Commission indicated its adherence to the findings and conclusions contained in its *Pure Oil* decision, and in Order No. 232 A to the effect that indefinite escalation clauses are contrary to the public interest. The Commission also reemphasized the view, previously expressed in the *Pure Oil* decision and Order No. 232 A, that filings under such clauses have unreasonably burdened the Commission."

"These amendments were accomplished by amending, effective April 2, 1962, Parts 154 and 157, subchapter E, chapter I, of Title 18 of the Code of Federal Regulations, to add the last proviso now contained in section 154.93 (quoted in note 5 above), and to amend sections 157.14(a) (10), and 157.25, as quoted in note 6, above.

"As to this the Commission said in Order No. 242:

"Filings under indefinite escalation clauses have created a significant portion of the administrative burdens under which this Commission is laboring today. The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification but not that there shall be a chain reaction in a wide area whenever one producer in the area negotiates a contract at a new price level. The act requires the Commission to give precedence to the hearing and decision of rate increases, but the complexity of indefinite price clauses requires it to spend an undue amount of time in their interpretation and applica-

A number of producers, including Superior, filed applications for rehearing of Order No. 242. These were denied on April 4, 1962 (27 F.P.C. 666).¹⁷

Having set out the procedural history of the Commission regulations pursuant to which the Commission summarily rejected the filings in question, we now turn to a discussion of the arguments advanced by Superior in attacking the validity of those regulations.

Superior contends that the amended form of section 154.93 of the regulations, upon which the Commission relied in rejecting Superior's filings, is invalid because Superior was not accorded an evidentiary hearing in connection with the issuance of Order No. 242, which promulgated the critical amendment to that regulation.¹⁸ Superior urges that failure to grant such a

tion at the expense of making a prompt determination of the rate issues involved. Accordingly, in protecting the public against waves of increases which have no defensible basis, we also serve the need—which we believe we should take into account—of making the tasks of regulation more manageable.”

¹⁷ Six petitions for review of that order were thereafter filed. In each case the Commission moved to dismiss on the ground that the order was not reviewable prior to a specific application. Responsive to such motions one of these petitions for review was dismissed by the Third Circuit on July 17, 1962. *Shell Oil Co. v. Federal Power Comm'n* (not reported). Three of these petitions were dismissed by the Fifth Circuit on August 14, 1962. *Hunt Oil Co. v. Federal Power Comm'n*, 5 Cir., 306 F. 2d 878. The remaining two petitions were dismissed by the Tenth Circuit on May 20, 1963. *Pan American Petroleum Corp. v. Federal Power Comm'n*, 10 Cir., 317 F. 2d 796.

¹⁸ This was the addition of the final proviso, reading:

“Provided further, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.”

27 F.P.C. at 340.

hearing not only violates the Act, but also denies due process of law, as guaranteed by the Fifth Amendment.

The Act does not specify the procedures to be followed by the Commission in prescribing or amending rules and regulations, but provides only the general authority to prescribe, issue, make, amend and rescind them. See section 16 of the Act, 15 U.S.C. § 717o. The procedures to be followed in prescribing or amending administrative rules and regulations, including those of the Commission, are dealt with in section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003, to which Superior makes no reference. The procedures followed by the Commission which led to the issuance of Order No. 242, amending section 154.93 of the regulations, as described above, comport fully with the requirements of that statute.

In legislation, or rule-making, there is no constitutional right to any hearing whatsoever. *Bowles v. Willingham*, 321 U.S. 503, 519; *Willapoint Oysters, Inc. v. Ewing*, 9 Cir., 174 F. 2d 676, 694, *cert. denied*, 338 U.S. 860.

Superior contends that section 154.93 of the regulations, and section 154.100, as applied here, are invalid, because, assuming that the Commission has substantive authority to reject such contract provisions (a proposition which Superior denies and which will be discussed below), such authority must stem from sections 4, 5 and 7 of the Act, 15 U.S.C. §§ 717c, 717d and 717f, each of which requires the Commission to act only after hearing and no hearing was accorded Superior.

Superior's amendment to its certificate application, filed May 25, 1962, for the purpose of including therein Superior's interest in the 2,690 additional acres of gas dedicated to El Paso by the contract of

April 9, 1962, was filed pursuant to section 7c of the Act, 15 U.S.C. § 717f(c).

Under that section, with exceptions not here relevant, no natural gas company may engage in the transportation or sale of natural gas, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. This section further provides that, except in the case of so-called "grandfather" rights, or temporary certificates, the Commission shall set any application for such a certificate for hearing, the application to be decided, and the certificate to be issued or denied according to the procedure provided in section 7(e) of the Act, 15 U.S.C. § 717b(e). Section 7(e) specifies the standards to be applied in determining whether a certificate should issue and provides that the Commission may attach reasonable terms and conditions."

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sales, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Superior's notice of change in rate schedule No. 77 (supplement No. 8), was also filed on May 25, 1962. This was done, as heretofore stated, pursuant to section 4(d) of the Act, 15 U.S.C. § 717c(d), and for the purpose of applying, to the newly-dedicated acreage, the existing rates and contract rate provisions then in effect between Superior and El Paso. Under section 4(e) of the Act, 15 U.S.C. § 717c(e), the Commission is given authority to enter upon a hearing concerning the lawfulness of rates, charges, classifications, or service described in a section 4(d) filing, and, after full hearings, may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. The authority of the Commission to issue orders with regard to rates, charges, classifications, or services already, in effect, and providing for hearings, is set out in section 5(a) of the Act, 15 U.S.C. § 717d(a).

Superior represents that, if given an opportunity at a hearing, it would show that the particular price-changing clauses contained in its contract with El Paso have a definite relation to the economic requirements of Superior and to the economic conditions of the country and of the industry. It would further show, the company asserts, that the circumstances of Superior's operations in general and in the Aneth Field not only justify but require this type of indefinite pricing provision if there is to be any relation between the price for which Superior files in the future and the economic conditions then existing, and the economic requirements of Superior. Its evidence would conclusively demonstrate, Superior states, that the particular types of flexible pricing provisions used in its contracts are much more closely related to economic conditions and requirements than are the price provisions permitted under Order No. 242.

The substantive authority of the Commission to change contracts, if it exists at all,²⁰ stems from sections 4, 5 and 7 of the Act, as the Commission concedes. Those sections, as the text quoted above indicates, require that in proceedings involving particular rate and certificate filings, had for the purpose of exercising those substantive rights, a hearing must be accorded. But the precise question here is whether the Commission is limited, in the exercise of this substantive authority, to *ad hoc* proceedings under sections 4, 5 and 7, wherein hearings are concededly required, or whether it may, at least to the extent represented by the specific regulations here involved, exercise that substantive authority pursuant to its rule-making authority under section 16 of the Act, 15 U.S.C. § 717o.²¹

The specific regulations here invoked are those under which price redetermination clauses and fa-

²⁰ To be discussed below.

²¹ Section 16 reads, in pertinent part:

"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. * * * For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. June 21, 1938, c. 556, § 16, 52 Stat. 830."

vored-nation clauses of the kind contained in the Superior-El Paso contract,²² were determined in advance to be contrary to the public interest and filings containing them were made subject to summary rejection without hearing. We are not here concerned with the validity of those regulations insofar as they may affect price-changing clauses of a kind not involved in this proceeding.²³

In our opinion *United States v. Storer Broadcasting Co.*, 351 U.S. 192, requires us to hold that to the extent here exercised, and assuming existence of substantive authority, the Commission had power to provide by rule for summary rejection of rate and certificate filings, and was not required to exercise such authority through the medium of *ad hoc* proceedings under sections 4, 5 and 7, wherein hearings would have been required.

Storer involved the Communications Act of 1934, as amended, 47 U.S.C. § 301 et seq. Prior to November, 1953, Storer Broadcasting Co. owned or controlled five television broadcast stations. Proceeding under section 308 of the Communications Act, 47 U.S.C. § 308, the company applied to that Commission for a license to operate a sixth television station at Miami, Florida.

On November 25, 1953, while that application was pending, that Commission, exercising its rule-making

²² See notes 5 and 6.

²³ The desirability of confining this question to the specific price-changing clauses here in question is demonstrated by what has happened in another proceeding pending before the Commission. In *Atlantic Ref. Co.*, F.P.C. Docket No. CI 63-576, the Commission, on February 21, 1963, granted a rehearing to consider whether the regulations here invoked should be modified to permit escalation clauses in producer contracts which allow producers to change the price under a particular contract at will.

power under sections 4(i) and 303 (f) and (r), 47 U.S.C. §§ 154(i), 313 (f) and (r) of the Communications Act, amended its Rule § 3.636 with regard to multiple ownership of television broadcasting stations. Under the rule, as amended, it was provided, among other things, that no license for a television broadcast station shall be granted to any party who owns any other television broadcasting station "if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity." (351 U.S. at 194, n. 1.) The amended form of the rule also contained a provision declaring that ownership or control of more than five television broadcasting stations would be considered to be a "concentration of control contrary to the public interest, convenience or necessity."²⁴ (Id.)

On the day this rule amendment was promulgated, the Federal Communications Commission, on the basis of the amended rule dismissed, without hearing, Storer's pending application for a sixth television station at Miami.

Storer sought a review, in the Court of Appeals for the District of Columbia, of the order promulgating the rule amendment pursuant to which its application was denied. It contended that this rule, as amended, was in conflict with the statutory mandates that applicants should be granted licenses if the public interest would be served and that applicants must have a hearing before denial of an application. The statutory provisions relied upon by the company were sections

²⁴ The Communications Commission's Rules 1.361(c) and 1.702 permit applicants to seek amendments and waivers of or exception to its rules. See 351 U.S. at 201, n. 10.

309 (a) and (b) of the Communications Act, as they existed prior to 1960.²²

The Court of Appeals struck out, as contrary to §§ 309 (a) and (b), as they then existed, the provision added to Rule § 3.636 declaring that ownership or control of more than five television broadcasting stations would be considered to be a concentration of control contrary to the public interest, convenience or necessity (*Storer Broadcasting Co. v. United States*, D.C. Cir., 220 F. 2d 204).

The Supreme Court reversed, holding that the hearing requirement of then section 309(b) did not withdraw from the power of the Communications Commis-

²² Sections 309 (a) and (b), 47 U.S.C. § 309 (a) and (b) which have undergone amendment since 1935 then read (35 U.S. at 195, n. 5):

"(a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

"(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. . . . Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant . . . specifying with particularity the matters and things in issue. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon the issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

sion the authority, under its rule-making power, to promulgate the provision limiting applicants to five television broadcasting stations. The Supreme Court recognized that the challenged rule contained limitations against licensing not specifically authorized by statute. However, such general rule-making power, the Court held, is not limited to specific authorizations, but extends to matters not inconsistent with the Communications Act or law.

The Supreme Court further stated, in *Storer* (pages 203-205):

"This Commission, like other agencies, deals with the public interest. *Scripps-Howard Radio v. Federal Communications Comm'n*, 316 U.S. 4, 14. Its authority covers new and rapidly developing fields. Congress sought to create regulations for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret § 309(b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible 'concentration of control.' It is but a rule that announces the Commission's attitude on public protection against such concentration. The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. We think Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole. An applicant files his application with knowledge of the Commission's attitude toward concentration of control.

* * * *

"... We read the Act and Regulations as providing a 'full hearing' for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309(b), n. 5, *supra*, would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open." (Footnotes omitted.)

There is no substantial difference between the statutes involved in *Storer* and those involved in the case before us, insofar as hearing requirements and rule-making authority are concerned. As in the case of the rules of the Federal Communications Commission, the Federal Power Commission regulations permit applicants to seek amendment, waiver or repeal of its rules.²⁶ In *Storer*, as well as here, the effect of the rule, as applied, was to occasion summary denial of the application without hearing.²⁷ In *Storer* as well as here, the rule under attack repre-

²⁶ See note 10, above.

²⁷ In *Storer*, the application which was so denied was pending when the rule amendment was promulgated, whereas here, the filings in question were not pending, nor had the supplemental contract upon which they were based been executed when Order No. 942 was issued on February 8, 1962.

sented an exercise of substantive authority." Indeed, it was only because the rule there challenged was found to affect Storer's substantive rights that the Supreme Court held that the company had standing to petition for review of that rule.

Seeking to distinguish *Storer*, Superior points out that section 314 of the Communications Act of 1934, 47 U.S.C. § 314, expressly forbids ownership or control of stations where the purpose or the effect thereof might be to substantially lessen competition or to restrain commerce. It is argued from this that the Communications Commission was clearly authorized to promulgate rules to further the Congressional directive expressed in the Act.

This argument, however, goes only to the question of whether the Commission has substantive authority to reject applications which contain the proscribed price-changing clauses, whether by *ad hoc* proceedings or by general rule-making—a question to be explored below. The requirements of the Communi-

²² In *Storer* the Supreme Court observed (pages 199-200):

"The regulations here under consideration presently aggrieve the respondent. The Commission exercised a power of rulemaking which controls broadcasters. The Rules now operate to control the business affairs of Storer. Unless it obtains a modification of this declared administrative policy, Storer cannot enlarge the number of its standard or FM stations. It seems, too, that the note to Rule 3.636 (n. 1, *supra*) endangers Storer's stations as alleged in its petition for review. See this opinion, *supra*, p. 197, at (b). Commission hearings are affected now by the Rules. Storer cannot cogently plan its present or future operations. It cannot plan to enlarge the number of its standard or FM stations, and at any moment the purchase of Storer's voting stock by some member of the public could endanger its existing structure. These are grievances presently restricting Storer's operations. . . ."

(Footnotes omitted.)

cations Act with respect to the necessity of hearings are just as firm as in the Natural Gas Act. If the Communications Act requirements did not foreclose substantive regulation by means of rule-making under the circumstances of *Storer*, we do not perceive why the Natural Gas Act requirements do so under the circumstances of this case.

Superior also notes that the Communications Act involves the use of the public domain and does not pertain to rate regulation, whereas the property rights of natural gas companies are being subjected to regulation under the rate and certificate provisions of the Natural Gas Act. Accordingly, Superior argues, under the Communications Act there can be no question of confiscation of private property protected by the Fifth Amendment, whereas under the Natural Gas Act, the protection against confiscation is clear.

But again, we are not at this point considering the constitutionality of the challenged Federal Power Commission regulation, but only its validity in view of the provisions of the Act relating to the necessity for hearings. Of course if the regulations in question are unconstitutional, a question to be considered below, they cannot stand whether or not in conflict with statutory provisions pertaining to hearings.

Superior cites a number of decisions which it believes support the view that the regulations in question violate provisions of the Act relating to hearings.²⁹ None of these cases represented Commission

²⁹ Principal among these are *The Atlantic Refining Co. v. Public Service Comm'n* (Catco), 360 U.S. 378; *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.* (Memphis), 358 U.S. 103; *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575; *Willmut Gas & Oil Co. v. Federal Power Commission*, D.C. Cir., 294 F. 2d 245, cert. denied, 368 U.S. 975; and *Mississippi River Fuel Corp. v. Federal Power Comm'n*, 3 Cir., 202 F. 2d 899, dismissed on motion of petitioner, 345 U.S. 988.

action based upon a general rule, applied prospectively, in which the Commission had given concreteness to a standard of public interest. We have no doubt that, absent such a rule, or absent Commission action reasonably based thereon, the Commission may not rule adversely upon rate and certificate filings without granting a hearing of the kind specified in sections 4, 5 and 7. But that is not our case.

We are mindful of the fact that the Tenth Circuit has recently held Order No. 242 void and without effect. *Pan American Petroleum Corp. v. Federal Power Comm'n*, 10 Cir., 317 F. 2d 796, decided May 20, 1963.²⁰ That court appears to have reached this conclusion at least partly on the ground that Order No. 242 violates sections 4, 5 and 7 of the Act, in which hearings are provided for. Since, for the reasons indicated, we regard *Storer* as controlling on the question of the statutory necessity for a hearing, we respectfully decline to follow the *Pan American* decision.

Superior argues that, apart from the hearing requirements of sections 4, 5 and 7 of the Act, the summary rejection of its rate and certificate filings denied it procedural due process of law guaranteed by the Fifth Amendment, since due process entitled it to a hearing.

This constitutional question was not expressly raised in *Storer*. Nevertheless, it seems to us that decision, by implication, calls for rejection of Superior's argument. If the waiver provision of the agency's rules is sufficient to meet the requirements of the explicit statutory provisions pertaining to hearings, it would seem that they are also sufficient to

²⁰ The Tenth Circuit held that Orders Nos. 232 and 232A are in a different category because they are only advisory declarations of Commission policy and determine no rights.

meet the procedural requirements of the Due Process Clause of the Fifth Amendment.

Order No. 232A brought about the rule amendment by means of which the Commission determined, for prospective application, that certain kinds of price-changing clauses are contrary to the public interest. The rule amendment thereby accomplished thus gave specificity, in a particular area, to the statutory standard of public interest. Assuming that the Commission had substantive authority to promulgate this amendment (to be inquired into below), the rule had the same function and effect as if it were a statute proscribing, in the same explicit terms, the described price-changing provisions. So viewed, and absent special circumstances that would have warranted a request for a waiver, the application in a particular case of the explicit standard stated therein no more entitled persons affected to an evidentiary hearing as to the general merit of the standard than would have been the case if this concreteness had been expressed in the statute itself.

That an evidentiary hearing would not have been necessary in the latter case is made clear in *Denver Union Stock Yard Co. v. Producers Livestock Marketing Association*, 356 U.S. 282. The court there pointed out that the need for an evidentiary hearing, present when it is proposed to apply a statute couched in general terms, does not exist where the statute defines a duty in explicit terms." For the

"In the *Denver Union Stockyard* case, the Court said, at page 287:

"When an Act condemns a practice that is 'unfair' or 'unreasonable,' evidence is normally necessary to determine whether a practice, rule, or regulation transcends the bounds. See *Associated Press v. Labor*, 301 U.S. 103; *Chicago Board of Trade v. United States*, 246 U.S. 231; *Sugar Institute v. United States*, 297 U.S. 553. But where

reasons stated above, we regard this principle as applicable to the rule amendment accomplished by Order No. 232 A. The rule amendment effectuated by Order No. 242, providing for summary rejection of price-changing clauses proscribed under the rule promulgated by Order No. 232 A, also gave effect to this principle and, in our opinion, does not offend the Due Process Clause.

In contending that due process of law entitled it to an evidentiary hearing, Superior cites a number of decisions which we now notice.

The most recent of these is *Hannah v. Larche*, 363 U.S. 420, sustaining the validity of certain rules of procedure adopted by the Commission on Civil Rights. We find nothing in this opinion which supports petitioner's view. The court there held that since the Commission on Civil Rights makes no adjudication but acts solely as an investigative and fact-finding agency, the questioned rules of procedure under which affected persons were not afforded a hearing, do not violate the Due Process Clause.

In *Hannah* the Court pointed out that the requirements of due process frequently vary with the type of proceeding involved. Thus, said the Court, at page 442, in the passage which we assume Superior relies upon, when governmental agencies "adjudicate or

an Act defines a duty in explicit terms, a hearing on the question of statutory construction is often all that is needed. See *Securities and Exchange Comm'n v. Ralston Purina Co.*, 346 U.S. 119 (public offering); *Addison v. Holly Hill Co.*, 322 U.S. 607 (area of production). It is, of course, true that § 310 of the Act provides for a 'full hearing' on a complaint against a 'regulation' of a stockyard. That was also true of the Act involved in *United States v. Storer Broadcasting Co.*, 351 U.S. 192. But we observed in that case that we never presume that Congress intended an agency 'to waste time on applications that do not state a valid basis for a hearing.' *Id.*, at 205."

make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."

But the rules here under challenge are not adjudicatory in nature. They do not affect any contractual right which was in existence when the rule became effective. The problem would be different if the effect of the rules was to proscribe rates already in effect.²² Moreover, under the Commission's rules, if there are any circumstances which indicate that the schedules or contracts in question do not contain proscribed clauses, or that the rules should be waived in the particular case, the applicant is afforded a hearing.

Another case relied upon by Superior is *Morgan v. United States*, 304 U.S. 1. In this case, however, as was pointed out in *Hannah* (at page 451), the government agency made a determination in the nature of an adjudication affecting legal rights. What happened was that the Secretary of Agriculture fixed the maximum rates to be charged by market agencies at stockyards without conducting a trial-like hearing. This decision may or may not be authority for holding

²² In *Wisconsin v. Federal Power Comm'n.* 373 U.S. 294, the Court, commenting upon a contention by the State of California that the Commission should have declared void, *ab initio*, spiral escalation clauses in the contracts of Phillips Petroleum Co., referred to Commission Orders Nos. 232, 232 A and 242. In this connection the court said, at page 304:

"Further, we see no merit in California's contention. It is true that the Commission has announced *prospectively* that it would not accept for filing contracts containing such clauses, but it would have been quite a different matter for the Commission to have declared the *past* rate increases were ineffective simply because they were based on spiral provisions. . . ." (Footnote omitted.)

that the Commission cannot validly, by rule, proscribe escalation clauses which would allow producers to change the price under a particular contract at will, subject only to Commission regulations.³³ But the rules, as applied to the particular price-changing clauses involved here do not, in our opinion, partake in any degree of a maximum rate order, or a rate-freezing order, especially in view of the leeway allowed under the waiver provision to bring special circumstances to the attention of the agency.

The third Supreme Court decision relied upon by Superior in connection with the question under discussion is *Northern Pac. Ry. Co. v. Department of Public Works*, 268 U.S. 39. As in *Morgan*, however, the agency proceeding was one for the purpose of fixing rates. The Court held that in such a proceeding an order based upon a finding made without evidence or upon evidence which clearly does not support it, is a denial of due process. For the reasons stated in discussing *Morgan*, this decision is not in point here.

Only one of the remaining cases cited by Superior on this branch of the case warrants more than passing comment.³⁴ We refer to *Philadelphia Co. v. Securities & Exchange Comm'n*, D.C. Cir., 175 F. 2d 808, dismissed as moot 337 U.S. 901.

³³ It has previously been noted that the Commission is now giving consideration to a modification of its rules to permit escalation clauses of this kind. See note 23 above.

³⁴ Thus *Warren Petroleum Corp. v. Federal Power Comm'n*, 10 Cir., 282 F. 2d 312, does not appear to involve any constitutional question. *National Labor Relations Bd. v. Burns*, 8 Cir., 207 F. 2d 437, involved an unfair labor practice proceeding, clearly adjudicatory in nature, in which the Examiner excluded competent and material evidence. *National Labor Relations Bd. v. Prettyman*, 6 Cir., 117 F. 2d 786, involved the same kind of proceeding.

Pittsburgh Railways, then in process of reorganization, was a "non-utility subsidiary" of The Philadelphia Company, a registering holding company, and under an S.E.C. rule, exempt from regulation under that Act. That Commission issued notice of a proposed rule which would deny exemption to a subsidiary in reorganization whose securities were guaranteed by a registered holding company. The effect of such a rule would be to remove Pittsburgh Railways' exempt status.

The agency advised interested parties that the proposed rule would be primarily applicable to Pittsburgh Railways. That Commission invited comments, views, written data and oral argument on the proposed rule, but denied Philadelphia's request for a hearing. The District of Columbia Court of Appeals held that the S.E.C. had improperly denied a trial type of hearing, holding that the agency action was adjudicatory because it was particular and immediate.

In our opinion the *Philadelphia* case is distinguishable from the one now before us. The regulations here in question were promulgated for general and prospective application. They were not, as in *Philadelphia*, directed primarily to a particular company with respect to a matter then pending. The circumstances which led the District of Columbia Circuit to hold that the proceeding was adjudicatory in nature are not present here.²³

We conclude that the summary rejection, without hearing, of Superior's rate and certificate filings here in issue, did not deprive the company of procedural due process of law.

²³ Since *Philadelphia* is distinguishable, we need not decide whether we would reach the same result under the facts of that case. But see 1 Davis, Administrative Law Treatise, § 7.01, pages 409-410, commenting upon that decision.

This brings us to a consideration of Superior's arguments directed to whether the Commission had substantive authority to proscribe the price-changing clauses in question and, if so, whether the exercise of that authority by the promulgation of the challenged rules, or in the application of those rules in this case, was in violation of the Act, unreasonable, arbitrary, capricious and discriminatory. Most of the arguments advanced under this branch of the case would have equal relevance if the Commission action had resulted from an *ad hoc* decision instead of from the application of general Commission rules.

Under the statutory scheme of the Natural Gas Act, Superior contends, independent producers have the right to enter into contracts to sell casinghead gas and, in connection therewith, to fix the initial rates for such gas and the conditions under which those rates may be changed in the future. The statute does not, Superior urges, require that future rate changes receive advance approval, or even the filing of rate proposals, but only notice to the Commission before rate changes may be put into effect. These statutory principles, Superior argues, are violated by a proscription upon price-changing clauses of the kind here in question, whether such proscription is the result of an *ad hoc* decision, or of general rule-making.

The Act permits the relations between the parties to be established initially by contract. Among the terms of such contracts are those governing the initial price to be charged. Unless there is provision in such a contract for price changes in the future, both seller and buyer are contractually bound by the initial price, and may not unilaterally obtain a price change even with the consent of the Commission. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332.

It is therefore usual for such contracts to contain price-changing clauses. In the case of a producer,

such clauses manifest the buyer's consent to a filing under section 4(d) of the Act for the purpose of effectuating a rate change in keeping with the price-changing clause. If the increase is challenged, the producer must still establish its lawfulness wholly apart from the terms of the price-changing clause. *Wisconsin v. Federal Power Comm'n*, 373 U.S. 294.

When a producer, as in this case, applies to the Commission, under section 7 of the Act, for a certificate of convenience and necessity authorizing it to sell natural gas in interstate commerce, the Commission must give consideration to the initial price provided for in the contract, and other contract terms relating to initial or future prices. *Atlantic Ref. Co. v. Public Service Comm'n*. (Catco) 360 U.S. 378, 391; *United Gas Improvement Co. v. Federal Power Comm'n*, 9 Cir., 283 F. 2d 817, 823, cert. denied, 365 U.S. 879. In *Catco* the Court stated that while under these circumstances, the Commission is not required to determine that the proposed initial price is just and reasonable, there should at least be "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." 360 U.S. at 391. It seems to us that, in such a certificate proceeding, the Commission is likewise empowered to scrutinize and react with respect to price-changing clauses in the contract which may trigger future rate filings.

If the Commission disapproves of the proposed initial price, it may grant the certificate only on condition that the price be changed. As stated earlier in this opinion, Superior obtained its present certificate only by accepting a reduction in its proposed initial rate. See notes 1 and 4. If a natural gas company does not find such a rate condition acceptable, it is not compelled to initiate the proposed service. See *Catco*, at 387-388. We see no reason

why these principles are not as applicable to price-changing clauses in the contract filed in support of the certificate application, as to clauses therein, specifying the initial price.

We reach the same conclusion with regard to the regulation of rates under section 4 (relating to new rate filings) and section 5 (relating to rates already in effect). Section 5(a) specifically authorizes the Commission to determine the just and reasonable "rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. . . ." (Emphasis supplied.) 15 U.S.C. § 717d(a). Section 4 does not make specific references to "contracts." But section 4(e) provides that the Commission may make such orders with reference thereto "as would be proper in a proceeding initiated after it had become effective," (15 U.S.C. § 717e(e)) thereby giving application to section 5(a) quoted above.²²

Superior calls attention to the fact that for five years, after the 1956 decision in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* (Mobile), 350 U.S. 332, the Commission requested, in its annual reports, legislation which would outlaw favored-nation price escalation clauses.

An unsuccessful attempt by an administrative body to secure an express grant from Congress is significant in determining whether the power so requested was conferred by the statute sought to be amended

²² In a practical sense, although perhaps not technically, only section 7 certificate authority is involved here. If the Commission, in the exercise of that authority, grants an application for a certificate only upon condition that proscribed price-changing clauses are deleted, the Commission will not be called upon to consider, under sections 4 or 5, the appropriateness of those clauses.

or supplemented. *Federal Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349, 351-352.

What was requested of Congress in the Commission's annual reports, however, went far beyond the power which the Commission exercised in promulgating the challenged regulation. The requested legislation would have outlawed price escalation clauses in existing contracts, whereas the Commission regulation has only prospective application.

The Commission may well have had doubts about its power to strike such clauses from existing contracts, either by general rule or *ad hoc* decision, without having a like doubt about its power to promulgate a general rule outlawing such clauses only for the future. The fact that Congress was unwilling to set aside, by statutory fiat, existing price escalation clauses, has no tendency to establish that the Commission did not already have power to deal with the problem prospectively after administrative consideration of the respective merits of the various kinds of price escalation clauses.

We recognize that sections 4, 5 and 7, in addition to providing substantive authority with regard to certificate and rate regulation, also specify procedures to be followed, including the necessity, of hearings, in exercising that authority. We have heretofore held, however, that with respect to the particular exercise of substantive authority represented by the Commission regulations here in question, that agency was free to proceed under its general rule-making power rather than case by case.

Superior contends that the proscription of the particular price-changing provisions here in question, however accomplished, is unreasonable, arbitrary, capricious and discriminatory, and that, to accomplish such proscription by general rule-making is, for that reason alone, unreasonable, arbitrary and capricious.

In *Pan American Petroleum Corp. v. Federal Power Comm'n*, 10 Cir., 317 F.2d 796, the Court stated that the summary rejection, without hearing, of a contract containing price-changing clauses, pursuant to the proscription of Rule 154.93, deprived the Court of any record upon which the rejection may be sustained. Pointing out that, upon motion of the Commission, Order No. 242, promulgating the amended form of rule 154.93, had been held not subject to Court review, the Court expressed the view that the Commission had, in practical effect, circumvented Court review of the basic question—the propriety of indefinite price-changing clauses.

We analyze the problem differently. In determining the propriety of rules of general application, only a legal question is presented—whether on the factual premise upon which the Commission acted, the rule promulgated is unreasonable, arbitrary, capricious or discriminatory. If the factual premise itself were open to review, then it would be necessary for all general rule-making to include a trial-like hearing. As stated earlier in the opinion, this is not required.

If there were facts which entitled Superior to a waiver of the rule, it would have been entitled to an evidentiary hearing on that question, and the factual support for any finding resulting from such a hearing would be subject to Court review. But no such hearing was here requested.

We turn to the specific grounds relied upon as showing that the rule proscribing the price-changing clauses before us, and rejecting in advance any filing containing them, is unreasonable, arbitrary, capricious and discriminatory.

Superior points out that the new filing only has the effect of applying, to the new acreage, price-changing clauses already in effect in the same contract with

the same buyer (El Paso), pertaining to the same field (Aneth Field). The company argues that all facts which justified the original certificate still exist and are of greater weight since no extension of the buyer's facilities will be required to take delivery of the new gas.

Since granting the previous certificates and thereby sanctioning the same price-changing provisions, the Commission has, through its studies, experience, and its findings in the *Pure Oil* case, 25 F.P.C. 383, come to the conclusion that such clauses are, and impliedly always have been, contrary to the public interest. This conclusion is as applicable to clauses now in effect with respect to certificated operations as to clauses proposed to be applied to newly-dedicated areas. While the rule reaches only the latter, this was the result of a procedural choice. It does not represent a determination that, to the extent now effective, such clauses are in keeping with the public interest.

Superior argues that a price-changing provision giving the buyer's consent to the purchaser to seek rate increases is fair, reasonable and lawful. To hold otherwise, the company contends, amounts to a prejudging of unknown future conditions and facts upon unknown evidentiary standards. Superior asserts that the outlawed provisions cannot possibly result in any price which is not just and reasonable and which is not related to the economic needs of the seller, because future rate filings designed to take advantage of such provisions, are subject to section 4 of the Act.

In our opinion the Commission had a reasonable basis for proscribing price-changing provisions of the kind before us, and the determination to do so was not arbitrary and capricious.

In its Order No. 242, 27 F.P.C. 339-341, the Commission stated that it intended the proscription thereby accomplished to be "rationally related to a condition which requires correction if regulatory objectives embraced by the statute are to be achieved." (*Id.* at 340). This was a proper objective. See *American Trucking Assn's v. United States*, 344 U.S. 298, 310, 314.

As its principal reason for outlawing some kinds of indefinite price escalation clauses the Commission stated in its order:

"... Increases in producer prices, triggered by indefinite escalation clauses, have resulted in a flood of almost simultaneous filings. These filings bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act contemplates that prices, to be just and reasonable, be related to economic needs. . . ."

27 F.P.C. at 340.

As an additional reason the Commission stated that the presence of such clauses in contracts on file with the Commission place such an administrative burden upon the Commission as to interfere with the performance of more important Commission functions. This portion of the Commission order is quoted in note 16 above.

In order No. 242, the Commission also referred to, and adopted, its conclusions stated in the *Pure Oil* case, 25 F.P.C. 383, with regard to the undesirable characteristics of such clauses. In its decision in that case, the Commission stated that such clauses are contrary to the public interest in a number of ways. They are, the Commission said, inherently unreasonable because they may be triggered by circumstances which have nothing to do with revenue needs or the

reasonableness of rates." Moreover, the Commission determined in that case, such clauses have an injurious effect which cannot be fully overcome by resort to the refund provision of the Act.²⁷

²⁷ As to this, the Commission said, in its *Pure Oil* decision, at page 389:

"... As indicated previously, under Pure's provisions, the company's prices are subject to triggering if El Paso pays any other producer within the specified area a higher price. There need be no economic or other substantial justification for the increase; the mere fact that a higher price is paid to some other producer would be sufficient to activate the increase. In our view, such an artificial ground for a proposed increase, operating in such a mechanical and arbitrary manner, and lacking any substantial relationship to the factors which bear on the value of gas or on a determination of a reasonable level of rates for it, does not constitute a proper basis for filing proposed increased rates or a sufficient justification for our giving effect to such a filing, at least if the rate contained therein is in excess of those in our producer price Policy Statement 61-1, as amended. And although other types of indefinite escalation provisions are triggered by other kinds of mechanisms, they are in principle subject to these same objections." (Footnote omitted.)

²⁸ On this point, the Commission said, at pages 389-390:

"The injury resulting from the practical effects of these clauses is exemplified by the evidence in this record. Thus, evidence adduced by El Paso indicates that escalation increases under clauses like those of Pure if activated by West Texas' sales will total some 18 million dollars annually. Furthermore, El Paso states that the filing of such increases for its gas supply will require the company to file for proposed increases in its rates. And it points out that by reason of spiral escalation clauses in its contracts with Phillips Petroleum Company, Phillips is entitled to and probably will file for an increase based upon El Paso's increase to its customers. Since Phillips will be permitted to collect this increase under refund obligation, says El Paso, once again the other producers will be entitled to

In the light of these Commission determinations, and with due regard to the experience, expertise, and neutral position of the Commission as a regulatory agency, we find nothing in Superior's arguments advanced here which would warrant a holding that the Commission acted unreasonably, arbitrarily or capriciously in proscribing the clauses involved in our case. Nor do we find anything in Superior's argument which would justify a conclusion that effectuation of the proscription by rule-making rather than *ad hoc* decisions, itself constitutes unreasonable, arbitrary or capricious action.

Superior contends that the regulations are discriminatory because pipelines are not subjected to the same regulations.

We agree with the Commission that a mere difference in treatment, by rule, of pipelines and producers does not invalidate a regulation. Section 16 of the Act, 15 U.S.C. § 717o, specifically provides that

"... for the purpose of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters."

Although the Natural Gas Act was enacted in 1938, the Commission did not undertake to regulate independent producers until after *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, was decided in 1954.

file for increased rates under their escalation provisions and the cycle will start anew." [Under contractual amendments, the spiral escalation clauses have been eliminated from Phillips' contracts.] According to El Paso, if the Pure rate increases here sought become effective, El Paso's gas purchase costs directly and indirectly will be increased in amounts ranging from \$35 million to \$51 million annually, in excess of El Paso's rate increases sought in its rate filing in Docket No. G-17929."

Since then the Commission's regulations have, in large measure, accorded different treatment to independent producers than to the long-regulated pipeline companies.³⁹

The Commission could well determine that there are practical differences between the operations of the two kinds of companies, which warrant different treatment with regard to price-changing clauses. Pipelines, unlike producers, do not ordinarily seek rate increases for sales to individual distributing companies, but instead file company-wide increases to reflect over-all increased costs in the operations. Such company-wide increases, moreover, are required by the applicable regulations to be supported at the time of filing by substantial cost data amounting to a full factual justification of the new rate.⁴⁰ Producers, by contrast, as the Commission points out, not only have continued to establish rates by individual contract but, in addition, their increased rate filings normally relate to such contracts or at most, to only a small portion of their total operation.

In holding that the proscription of price-changing clauses here in question is not unreasonable, arbi-

³⁹ As the Commission states in its brief:

"... Thus the filing requirements in both certificate and rate proceedings are much less detailed for independent producers than for pipelines. Compare Sections 154.1 through 154.86 of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.1-154.86, with Sections 154.91 through 154.103, 18 C.F.R. 154.91-103 (relating to rates); also compare Sections 157.5 through 157.22, 18 C.F.R. 157.5-157.22, with 157.23 through 157.31, 18 C.F.R. 157.23-157.31 (relating to certificates). Similarly, while a uniform system of accounts has been prescribed for pipeline companies of all sizes, none has been adopted for producers, and there are different requirements with respect to annual reports. . . ."

⁴⁰ 18 C.F.R. (1963 Cum. Supp.) § 154.63.

trary, capricious or discriminatory, we wish to once again emphasize that we so hold only with regard to the kind of clauses incorporated in the contract here at issue, and in the absence of any showing by Superior that special circumstances exist entitling it to a waiver of the rule.

Other contentions advanced by Superior, not discussed above, have been considered and determined by us to be without merit.

The Letter-Order of June 25, 1962, summarily rejecting the filings referred to therein, thereby giving effect to section 154.93 of the regulations, as amended by Order No. 242, is affirmed.

(Endorsed) Opinion Filed Aug. 26, 1963,

FRANK H. SCHMID, *Clerk.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, *Petitioner,*

vs.

TEXACO INC. AND PAN AMERICAN
PETROLEUM CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PAN AMERICAN PETROLEUM CORPORATION
IN OPPOSITION.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, *Petitioner*,

vs.

TEXACO INC. AND PAN AMERICAN
PETROLEUM CORPORATION, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PAN AMERICAN PETROLEUM CORPORATION
IN OPPOSITION

Respondent, Pan American Petroleum Corporation, Petitioner in Case No. 7303 below, hereby submits its Brief in response to the Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A of Petition) is reported at 317 F. 2d 796.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Pursuant to claim of authority under Sections 4, 5, 7 and 16 of the Natural Gas Act, the Commission issued rulemaking Order No. 242 requiring summary rejection of producer rate filings and certificate applications without hearings or findings under Section 4, 5 or 7 of the Act where the underlying sales contract contains flexible price changing provisions. As required by Order No. 242, the Commission summarily rejected and denied Pan American's, January 16, 1963, certificate application in Docket No. CI63-867 solely because the underlying sales contract provides for re-determination of the contract price effective after September 30, 1983. The result is that:

1. Pan American's contract rates effective after September 30, 1983, are disallowed without hearings and findings respecting whether they are just and reasonable,
2. Pan American's certificate application is denied without a hearing and findings of public convenience and necessity, and
3. Pan American is hereafter barred from showing before the Commission or the Courts that its post-September 30, 1983, contract rates are just and reasonable and is barred from now showing that its contract sale is required by the public convenience and necessity.

The issue below and the question here presented is: Whether the Constitution,¹ the Natural Gas Act and the Administrative Procedure Act permit the Commission to by-pass the hearings, adjudications, substantive findings, and factual record required by Sections 4(e), 5(a) and 7(c) and (e) of the Natural Gas Act in making substantive rate and certificate decisions.

¹ The Court below did not reach any of the Constitutional issues presented, because it did not find it necessary to reach the issues presented by Commission reliance on the substantive decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

STATUTES INVOLVED

The statutory provisions involved are Sections 4(c), (d) and (e); 5(a), 7(c) and (e), 16 and 19(b) of the Natural Gas Act, 52 Stat. 822 and 823 (1938), 56 Stat. 83-84 (1942), and 52 Stat. 830, 831 (1938), 15 U.S.C. 717c(c), (d) and (e), 717d(a), 717f(c) and (e), 717o and 717r(b).

STATEMENT

With respect to Case No. 7303 below,¹ the Commission seeks review of the decision below reversing its February 19, 1963, summary rejection of the certificate application of Respondent, Pan American Petroleum Corporation, in Docket No. CI63-867, without a hearing or findings of public convenience and necessity (R. 51). The sole ground for rejection is that the underlying sales contract violates Order No. 242, 27 F.R. 1356, 27 FPC 339, amending Order No. 232-A, 26 F.R. 2850, 25 FPC 609, by providing that for each five-year period commencing October 1, 1983, the contract price is the market price as determined by the parties (R. 21-22).

On February 27, 1956, in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, this Court held that the Act "purports neither to grant nor to define the initial rate-setting powers of natural gas companies" but that it limits Commission authority to "review" of the rates fixed by natural gas companies. The proceedings which resulted in Order No. 242 were instituted by notice issued April 4, 1956, in Docket No. R-153, proposing summary rejection of initial rate schedule filings which are supported by producer sales contracts containing certain flexible change in price provisions. Except for comments filed in April and May of 1956, there were

¹The Petition for Writ of Certiorari consolidates two separate cases below which were briefed and argued on different records. The record printed for use of the Court of Appeals in *Pan American Petroleum Corp. v. FPC*, Case No. 7303 below is at pages 3a-20a in the Appendix to the Petition for Review filed by Pan American. Nine copies thereof are being filed as permitted by Rule 21(4) of the Rules of this Court.

no further proceedings until March 3, 1961, when the Commission issued Order No. 232, 25 FPC 379, determining that all flexible change in price provisions in independent producer contracts *tendered for filing* on and after April 3, 1961, are *inoperative* and of *no effect at law*. By Order No. 232-A, 25 FPC 609, issued March 31, 1961, the Commission amended Order No. 232 to restrict its applicability to contracts *executed* on or after April 3, 1961.

In addition to the favored nation and spiral escalation provisions emphasized in the petition, Order No. 232 invalidated five-year price renegotiation and market price redetermination provisions such as the contract provision before the Court in the instant case. Concurrently with these rule-making proceedings, the Commission, as shown by its Annual Reports for fiscal 1956, 1957, 1958, 1959, and 1960, unsuccessfully requested that the Act be amended to eliminate favored nation and spiral escalation provisions from producer contracts. In its Annual Reports for fiscal 1961 and 1962, the Commission requests Congress to "Amend Section 7(c) to eliminate the mandatory hearing requirement."

By notice issued October 10, 1961, in Docket No. R-203, the Commission proposed amending Order No. 232-A to require *summary rejection* of producer rate schedules and certificate applications supported by contracts containing flexible change in price provisions. On February 8, 1962, the Commission issued Order No. 242, 27 FPC 339, which (1) requires *rejection of all producer rate schedules and applications for certificates of public convenience and necessity* supported by contracts executed on or after April 2, 1962, containing flexible change in price provisions, and (2) provides that, with respect to pipeline certificate applications, *such contracts will not be considered in support of the pipeline company's gas supply*. Pan American duly filed its application for rehearing and, upon denial thereof, it duly filed its petition for judicial review of Order No. 242. The Commission success-

fully moved to dismiss asserting that Order No. 242 is not directly reviewable, *Pan American Petroleum Corp. v. FPC*, Case No. 387, October Term, 1963, pending.

On January 16, 1963, Pan American filed under Section 7(c) of the Act its certificate application in Docket No. CI63-867 (R. 2-50) covering its sale of gas to Colorado Interstate Gas Company for transportation and resale in Colorado Interstate's proposed Wind River Basin pipeline, Docket No. CP63-206. On February 19, 1963, the Commission rejected and returned Pan American's certificate application because the October 4, 1962, contract with Colorado Interstate violates Orders No. 232, 232-A and 242 by providing for redetermination of the price effective after September 30, 1983 (R. 51). On March 4, 1963, Pan American filed its application for rehearing (R. 53-63), and on March 6, 1963, its application for rehearing was denied (R. 64-65). Thereafter on March 8, 1963, Pan American filed its petition for review in *Pan American Petroleum Corp. v. FPC*, Case No. 7303, 10th Circuit.

The Court of Appeals held that Order No. 242 is invalid and void under Section 16 of the Act because it is contrary to and in violation of the hearing and review on a factual record regulatory scheme prescribed in Sections 4, 5 and 7 of the Act. The Court held that the Commission does not have authority to legislate in what it conceives to be the public interest, but that it is entirely a creature of the Natural Gas Act, and the determining question is what the Act allows. Cf. *FPC v. Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949); *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954).

Respecting the Commission's argument, the Court of Appeals stated:³

"Section 16 of the Act empowers the Commission to make rules and regulations to carry out the provisions of

³ Footnotes and footnote references are omitted from all quotations herein.

the Act but that section is not a source of power to regulate in conflict with substantive provisions of the Act. The Commission asserts that the necessary authority flows from §§ 4, 5 and 7." 317 F. 2d 805.

With respect to the scope of judicial review the Court of Appeals held:

"Our difficulty is immediately apparent. The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question—the propriety of indefinite price-changing clauses." 317 F. 2d 804-805.

With respect to the legal and factual arguments advanced by the Commission, the Court of Appeals held:

"These findings are not made in the language of the statutory standards of 'just and reasonable' and 'public convenience and necessity.' The public interest must be related to and tested by these standards. Although the Commission is the guardian of the public interest in the administration of the Act, *the Commission may not substitute its standards for the statutory standards.* Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." 317 F. 2d 806 (Emphasis supplied).

In *Pan American Petroleum Corp. v. FPC*, Case No. 387, October Term, 1963, Pan American seeks review of the decision below that Order No. 242 is not *directly reviewable*. It is respectfully submitted that consideration of the Petition for Writ

of Certiorari in the instant cases will be facilitated if it and the Petition in Case No. 387 are considered together.

ARGUMENT

1. Statement of Pan American's Position.

Pan American's position is that the Court below should have reviewed Order No. 242 in Case No. 7002 below, companion case No. 387 now pending in this Court, where review would have been on the record in the rulemaking proceeding. Because the Court below found that Order No. 242 did not satisfy the threshold test of consistency with Sections 4, 5, 7 and 16 of the Act, it did not reach the issue of factual support for the findings advanced by the Commission in support of Order No. 242 and was not hampered by the Commission failure to certify in the instant cases the record in the rulemaking proceedings. However, as noted on page 2 of the Supplemental Memorandum of Petitioner, the Court of Appeals for the 9th Circuit reviewed the factual findings advanced by the Commission even though the Commission did not certify to the 9th Circuit a factual rulemaking record purportedly supporting such findings.

As is shown on pages 15 and 16 of the Petition in companion Case No. 387 pending in this Court, the apparent inter-circuit conflict advanced by the Commission is a direct result of the erroneous decision of the Court below respecting *direct review* of Order No. 242. Pan American recognizes that an inter-circuit conflict supports granting the Commission's petition, but respectfully submits that, as shown in the Petition in Case No. 387, this apparent inter-circuit conflict is a direct result of Commission insistence on indirect review of Order No. 242 without the Order No. 242 record.

The result in the instant cases is that, if this Court finds it necessary to resolve this apparent inter-circuit conflict, it can do so with respect to the threshold issue, whether Order No. 242 is

consistent with Sections 4, 5, 7 and 16 of the Act, but, because the record in the rulemaking proceedings is not before it in the instant cases and was not before the 9th Circuit in the *Superior* Case, this Court cannot reach the issues of reasonableness and arbitrary action.

2. The Commission's Petition and Supplemental Memorandum are Based on Erroneous Assumptions.

The Commission bases its case upon two assumptions: (1) that the decisions cited by Pan American in its Petition in companion Case No. 387, pending in this Court are not applicable to *direct* review of Order No. 242, and (2) that some of these same decisions authorize it (a) to bypass and modify the substantive provisions of the Natural Gas Act as interpreted by this Court in *Mobile*, and *Memphis*,⁴ and (b) to issue substantive rules without making a factual record in support of the findings recited as the basis for such rules. Neither of these assumptions is correct. The error of the first assumption is adequately demonstrated in Pan American's Petition in companion Case No. 387. The errors in the second assumption will be hereinafter demonstrated.

This case does not present a fundamental question as to the scope of the Commission powers under Section 16 of the Act.⁵ That issue was resolved in *FPC v. Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949), when the Court rejected the Commission argument that Section 16 is a source of authority to bypass or modify substantive provisions of the Act. In the instant cases, the Court of Appeals merely held that Order No. 242 conflicts with the substantive regulatory scheme prescribed in the

⁴ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103 (1958).

⁵ The Administrative Procedure Act does not enlarge the Commission's substantive powers or rulemaking authority.

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Act as interpreted by this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, 358 U.S. 103 (1958).

The doctrine of *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), that rulemaking decisions must conform to the delegation of substantive authority in the basic statute and have a reasonable basis in fact is applicable to this case. However, the affirmance of the FCC regulation in the *Storer* case and the invalidation of the FCC regulation in the *American* case are not applicable to whether Order No. 242 conforms with the delegation of authority in the Natural Gas Act. The substantive regulatory standards applicable to regulation of broadcasting are vastly different from those applicable to regulation of prices for natural gas. One essential difference is that the Natural Gas Act regulates the price of a privately owned commodity protected by the full limitations of Fifth Amendment due process. The Communications Act provides for licensing limited use of the public domain, the carriers of radio frequencies, and is based upon entirely different Constitutional and statutory concepts than regulation of natural gas prices. Obviously, decisions applicable to licensing use of the public domain cannot be validly cited as the upper limit of rulemaking authority applicable to regulation of the price for private property. This distinction is particularly relevant to the Constitutional and statutory requirement of a hearing, factual record, and substantive findings present in the instant cases, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944),

In interrelated case, *Pan American Petroleum Corp. v. FPC*, Case No. 387 pending in this Court, the Commission argues that these decisions of this Court respecting the criteria for determining parties aggrieved and reviewability of orders are not applicable to determine whether Order No. 242 is directly reviewable. In the instant case it argues that the substantive decisions in these cases are applicable to whether Order No. 242 is invalid. Each of these arguments by the Commission is without foundation in law or reason.

but absent in *Storer*, 302 U.S. 192, 202.⁷ A further distinction is that, contrary to the instant cases,⁸ the *Storer Broadcasting* and *American Broadcasting* cases constituted *direct* review of regula-

⁷ In its Annual Reports for fiscal 1961 and 1962, the Commission requests that Section 7(c) of the Natural Gas Act be amended by eliminating "the mandatory hearing requirement" and substituting therefor "notice and opportunity for hearing" to relieve the Commission from holding hearings where no useful purpose is served.

In its August 26, 1963, decision in *Superior Oil Co. v. FPC*, Case No. 18252 (unreported), the Court of Appeals for the 9th Circuit rejected this basic distinction between the Communications Act as interpreted in *Storer* and this Court's interpretation of the Natural Gas Act in *Mobile* and *Memphis*, *infra*. Its conclusion that substantive decisions in the form of rulemaking orders need not be supported by a factual record is contrary to this Court's decision in the *Storer* case.

The purported remedy under Section 1.7(b) of the Commission Regulations, 18 CFR Section 1.7(b), is illusory with respect to Order No. 242. As the Commission recognizes in its Petition for Writ of Certiorari in *FPC v. H. L. Hunt, et al.*, Case No. 273, October Term, 1963, producers cannot keep gas fields shut in indefinitely pending certification of the sale. Since the primary purpose of Order No. 242 is to avoid hearings and evidentiary findings, the Commission will not allow Section 1.7(b) of its Regulations to be interpreted as providing for "evidentiary hearings" here. This is well illustrated by the proceedings in *Atlantic Refining Co.*, Docket No. C162-1562, to which reference is made on page 14 of the Petition. There the Examiner excluded all factual evidence respecting economic justification for the Memphis type provision in Atlantic's contract. The Examiner ruled that the only issue was one of law. The Commission has not rendered its decision.

⁸ The Commission did not certify a factual record showing whether Respondent's price redetermination provision is inconsistent with regulatory standards prescribed in the Act or unnecessary or inappropriate to carrying out the regulatory scheme prescribed in the Act. One pipeline company, El Paso Natural Gas Company, has created numerous controversies respecting the favored-nation provisions in its contracts. However, this fact, which is not shown in the record below, does not sustain rejection of all flexible price changing clause contracts with all interstate gas pipeline purchasers.

The Commission attempts to overcome the absence of a factual record by citing its decision in *Re The Pure Oil Co.*, 25 FPC 383, Opinion No. 341, issued March 3, 1961. Respondents were not parties to that proceeding, and the Court of Appeals did not have the *Pure* record before it in the instant case. Commission policy prohibits certification of the *Pure* case record to the Court in the instant cases (App. 1a).

tions and the Court had before it the factual record upon which the regulations were based.

The Commission's third argument is that invalidation of Order No. 242 will frustrate its regulation of producer prices. With the area rate method of regulation, most, if not all, of the difficulties cited by the Commission in its Order No. 242 have evaporated or will evaporate. The decision of the Court of Appeals has no effect upon the issuance of Commission policy statements.

"We are deciding only the cases before us. The problems of area pricing are not presented here. In our opinion Order No. 242 is void and without effect. Orders Nos. 232 and 232-A are in a different category. As advisory declarations of Commission policy they determine no rights." 317 F. 2d 807.

The Court of Appeals did not "emasculate the Commission's power to use its rulemaking authority for the formation of general legal and policy standards" with respect to "problems which are industry-wide in character and show little, if any, variation from case to case." It did, however, state that the Commission had not certified a factual record from which the Court could determine whether the economic justifications for rates filed pursuant to different kinds of flexible price changing provisions "show little, if any, variation from case to case."

3. The Question Presented in This Case Has Been Decided by This Court.

In *Willmut Gas & Oil Co. v. FPC*, 294 F. 2d 245, 250, (D.C. Cir. 1961), cert. den. 368 U.S. 975, the Commission successfully argued that the interpretation of the Act by this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958), prohibits substantive rulemaking in the nature of Orders Nos. 232, 232-A, and 242.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, supra, this Court held:

"These sections [Sec. 4(d), 4(e), and 5(a) of the Act] are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. *The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.*" 350 U.S. 341 (Emphasis supplied).

"In short, the Act provides no 'procedure' either for making or changing rates; it provides only for notice to the Commission of the rates established by natural gas companies and for review by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain *undefined and unaffected by the Act.*" 350 U.S. 343 (Emphasis supplied).

In *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958), this Court sustained the argument that flexible price changing clauses in natural gas company sales contracts are necessary, proper and desirable under the Act. The Court again interpreted the rate regulatory provisions of the Act as follows:

"United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so. The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission,

in the case of rates for sales of gas for other than exclusively industrial use, to suspend the new rates for a five-month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed." 358 U.S. 113.

In *Sumray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137 (1960), the Court held that the Commission could not in 1961 regulate producer contractual provisions by making final determinations of rights under contractual provisions that would not come into operation until 1983. In *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and *FPC v. Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949), this Court held that the Commission does not have the power to legislate interstitially so as to relieve it from performance of its obligations under the regulatory scheme prescribed in the Act. This holding was subsequently confirmed in *Atlantic Refining Co. v. Public Service Comm.*, 360 U.S. 378 (1959), in which the Court held that the Commission cannot substitute expediency and its conception of the public interest for the requirements of a hearing and findings applying record facts to the substantive regulatory standards prescribed in Section 7(e) of the Act.

These decisions make it clear that, in attempting to write the price changing provisions in Pan American's contract with Colorado Interstate, the Commission has attempted to rewrite the Act to disallow Pan American's rate filings and certificate application without the hearing and substantive findings required by Section 4(e) and 7(c) and (e) of the Act.^{*} The issue is not whether the Court of Appeals decision emasculates Section 16 of the Act, but whether Order No. 242 emasculates Sections 4, 5 and 7 of the Act. The decision in the *Willmut* case, *supra*, that this Court has

^{*}In its Annual Reports for fiscal 1956, 1957, 1958, 1959 and 1960, the Commission unsuccessfully requested that the Act be amended in this respect. In its Annual Reports for fiscal 1961 and 1962, the Commission asked Congress to "Amend Section 7(c) to eliminate the mandatory hearing requirement."

authoritatively decided the question presented in the petition is clearly correct.

4. The Decision of the Court of Appeals is Correct.

It is well settled that general regulations are invalid unless permitted under the Congressional delegation of substantive authority in the basic statute and consistent with the Administrative Procedure Act and due process of law.⁸ If the regulation satisfies this threshold test, it is, nevertheless, invalid unless it has a reasonable basis in fact. As is shown on the preceding pages, Order No. 242 does not satisfy the threshold test of consistency with the substantive provisions of the Act.

The Court of Appeals held, and the Commission recognizes, that the findings advanced in support of Order No. 242 are not related to the substantive standards, "just and reasonable rates" and "public convenience and necessity," which Sections 4, 5 and 7 of the Act require the Commission to apply to rate schedule filings and certificate applications, "We find no statutory authorization for the Commission actions here attacked." Sections 4 and 5 state that "The controlling standard is what is just and reasonable . . . Section 7(e) states that the certificate will issue if the Commission finds that the proposed service 'is or will be required by the present or future public convenience and necessity'." 317 F. 2d 805.

In support of its petition the Commission now seems to argue that, under the Act, the "public interest" is one and the same thing with findings of "just and reasonable rates," under Section 4(e), and "public convenience and necessity" under Section 7(e). However, in the Court below the Commission argument was that, in disallowing rates and denying certificate applications, the "pub-

⁸FPC regulations, *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); FCC regulations, *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 294 (1954); ICC regulations, *East Texas Lines v. Frozen Food Express*, 351 U.S. 49 (1956); and CAB regulations, *CAB v. Delta Air Lines*, 367 U.S. 316 (1961).

lic interest" permits it to apply different substantive standards that are not as well defined as "just and reasonable rates" and "public convenience and necessity." The Court rejected this argument, "The public interest must be related to and tested by these standards." 317 F. 2d 806. It held that the Commission may proceed by issuing general regulations and policy statements where necessary or *appropriate to carry out the provisions of the Act*. Its holding that the Commission's attempt to "make contracts" for the sales of gas before it in the instant cases is without support in law or fact is clearly required by the decisions of this Court.

As is clear on the face thereof, the Commission factual arguments in support of Order No. 242 are not even remotely applicable to the contract provision before the Court in this case.¹¹ In addition, Commission argument that flexible change in price provisions are generally unnecessary and undesirable is refuted by the decision in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103. (1958).¹² Its argument that there is generally no economic justification for the prices prescribed in flexible price changing clauses is refuted by the decision in *Wisconsin, et al. v. FPC, et al.*, 373 U.S. 294 (1963). Similarly, the contention that the Commission is unable to make an adversary adjudication of the facts respecting the economic justification for flexible price changing provisions is refuted by the area rate proceedings pending in Docket Nos. AR61-1, et al., and AR61-2, et al., and by the recently instituted proceeding, *Sunray DX Oil Co., et al.*, Docket Nos. G-4281, et al., May 28, 1963.

In Burlington Truck Lines, Inc., et al. v. United States, et al.,

¹¹Pan American's contract provides that once every five years beginning October 1, 1983, the parties will determine the price that Pan American may file as a change in rate under Section 4(d) of the Act. As in the case with all contract prices and provisions, Pan American's contract prices and provisions are the product of negotiations with respect to known and anticipated economic and market conditions.

¹²The Court of Appeals for the Third Circuit reached essentially the same conclusions in *Shell Oil Co. v. FPC*, 292 F. 2d 149, 152 (1961), cert. den. 368 U.S. 915.

371 U.S. 156 (1962), and *Florida Lime and Avocado Growers, Inc., et al. v. Paul, et al.*, 373 U.S. 132 (1963), this Court held that argument of counsel and statements of reasons for issuing orders are not facts which support the issuance of orders and cannot be advanced as a substitute for record facts.¹⁷ The Court of Appeals was clearly correct in its statement that:

"Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." 317 F. 2d 806.

Obviously, the Court of Appeals must have record facts upon which to sustain factual arguments made by Counsel, and the Commission's summary action in the instant case "precludes the possibility of any effective judicial review" of its factual and policy arguments.¹⁸

The decision below that findings of expediency do not relieve the Commission from its statutory obligation to make a factual record showing the "reason why" in terms of the substantive standards prescribed in the Act is clearly correct: cf. *Atlantic Refining Co. v. Public Service Comm.*, 360 U.S. 378 (1959). This is true regardless of factual support or lack of factual

¹⁷Regardless of the nature of the proceeding, Commission substantive decisions must be supported by record facts, *The Pure Oil Co. v. FPC*, 292 F. 2d 350 (7th Cir. 1961).

¹⁸The Commission argument that the Court of Appeals should have required it to certify a record showing the facts upon which it was making its arguments is clearly misleading. Aside from the fact that the obligation to furnish facts in support of its arguments is a Commission obligation, it would clearly be improper for the Court of Appeals to require certification of additional record materials after the briefs had been filed and the case argued. The parties are entitled to know the contents of the record upon which the case will be decided prior to making their final arguments. In Pan American's experience, attempts to obtain certification of additional items of record have been singularly unsuccessful. (App. 1a).

support for the Commission's findings of expediency.¹⁹ The decision below that the Commission may not use summary procedures to "preclude the possibility of any effective judicial review" of Section 4(e), 5(a) and 7(e) substantive rate and certificate adjudications is similarly correct.

The reasoning of the Court below is in accord with well settled principles of public regulatory law. Its decision follows the decisions of this Court and the Court of Appeals interpreting the substantive provisions of the Act and the requirements of due process. The Court of Appeals decision does not directly or indirectly emasculate Commission authority to use rulemaking "for the formulation of general legal and policy standards." It merely holds that the particular legal and policy standards formulated by Order No. 242 are without support in the Act as interpreted in the *Mohile* and *Memphis* cases, supra, and are not supported by factual record. The requirements of support in a factual record and consistency with the Act as interpreted by this Court do not emasculate any legitimate exercise of authority.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, unless the Petition in Case No. 387 is granted, the Petition in the instant cases should be denied. If the Petition in Case No. 387 is

¹⁹The Commission has not cited any court decisions in support of its argument that it has authority to modify contractual pricing provisions as distinguished from disallowing contract rates as being unjust and unreasonable. At page 18 of the petition it states that the "true regulatory task" is "determining the just and reasonable rate."

Contrary to its assertion in the instant cases, the Commission in Case No. 7002 below, Case No. 387, pending in this Court, vigorously argued that Order No. 242 regulates the making of new contracts and does not modify existing (pre-April 2, 1963) contracts.

granted, Pan American would not oppose granting the Petition in the instant cases.

Respectfully submitted,

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September, 1963

APPENDIX

APPENDIX

Commission letter objecting to certification of Orders No. 232 and 232-A rulemaking record in Case No. 7002 below, Case No. 387 pending in this Court.

FEDERAL POWER COMMISSION

Washington 25, D.C.

Pan American Petroleum Corp. v. F.P.C.
CA10 No. 7002

May 10, 1962

Honorable Robert B. Cartwright
Clerk, United States Court of Appeals
for the Tenth Circuit
Denver 2, Colorado

Dear Mr. Cartwright:

A motion to dismiss this case is now in preparation in this office and is expected to be filed shortly. As it appears unnecessary to undertake the preparation of a certification of the record, if the petition is dismissible on its face, we shall also ask for an enlargement of the time to file a certification until after disposition of the motion.

We note, however, that petitioner has filed a so-called "Initial Designation of Record," which purports to be submitted in accordance with Rule 34(8)(a) of the Court's rules. This rule applies where " * * * petitioner has, or has reasonable access to, a copy of the transcript * * *." As respondent has not yet certified the record, this rule is not applicable here. While we cannot speak with certainty until the Commission itself has certified what constitutes "the record on which the order complained of was entered" (Section 19(b); cf. *Norris & Hirschberg v. S.E.C.*, 163 F. 2d 689, 692, certiorari denied, 333 U.S. 867),

it seems evident that petitioner is in error in its effort to anticipate the contents of the record, since its "designation" includes items from Commission dockets in which orders were entered by the Commission which are not here sought to be reviewed.

In these circumstances, it is respectfully requested that no action be taken with regard to the printing of any parts of the record until the Commission certifies the record and the parties have made proper designations based on it.

Copies of this letter are being sent to all counsel simultaneously herewith.

Very truly yours,

/s/ Howard E. Wahrenbrock
Solicitor

cc: J. P. Hammond, Esquire
William H. Emerson, Esquire
William J. Grove, Esquire
Carroll L. Gilliam, Esquire

FEB 10 1964

No. 386

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION,

Petitioner,

VS.

TEXACO INC. AND PAN AMERICAN
PETROLEUM CORPORATION

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

**Motion of the People of the State of California and the
Public Utilities Commission of the State of Cali-
fornia for Leave to File Brief Amici Curiae in
Support of Petitioner, and Brief Amici Curiae**

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February 7, 1964

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION,

Petitioner,

vs.

TEXACO INC. AND PAN-AMERICAN
PETROLEUM CORPORATION,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

Motion of the People of the State of California and the Public Utilities Commission of the State of California for Leave to File Brief Amici Curiae in Support of Petitioner

The People of the State of California and the Public Utilities Commission of the State of California (California), through their Attorney and Chief Counsel, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully move for leave to file, in the above-entitled case, their brief amici curiae, annexed hereto, which supports the position of the Federal Power Commission, petitioner herein.

The Attorney and Chief Counsel for the Public Utilities Commission of the State of California is charged with the duty and

responsibility of representing and appearing for the People of the State of California and the Public Utilities Commission of said State in all matters concerned with public utility regulation (Section 307, California Public Utilities Code).

Of direct concern to the State of California is the issue in this case relating to the power of the Federal Power Commission (Commission) to prohibit, by way of its rule-making authority, contractual arrangements which it finds incompatible with the public interest. The interest of California, the largest natural gas consuming state in the nation, in an adequate supply of natural gas at just and reasonable prices has been constantly frustrated by the incessant "triggering" of indefinite price changing provisions in gas sales contracts. California played a prominent and significant role in the litigation which lead to Commission's prohibitions against indefinite escalation clauses. See *The Pure Oil Co.*, 25 FPC 383 (1961), affirmed *The Pure Oil Co. v. Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962). California's efforts to bring about the elimination of indefinite escalation clauses have been continuing and consistent. See *Shell Oil Co.*, FPC Dkt. No. RI61-515, Opinion No. 382, issued March 15, 1963.

California brought the issue of indefinite escalation clauses to this Court in *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 303-304 (1963). The issue was dismissed on procedural grounds. This case presents an opportunity for this Court now to consider the issue on the merits.

In this case, the petitioner primarily argues the scope of its rule-making power under Section 16 of the Natural Gas Act¹ and only incidentally, the sound regulatory principles which compelled the petitioner to exercise its rule-making power. The brief which amici curiae are requesting permission to file contains an argument on the issue of the rule-making power as the necessary and

1. 52 Stat. 830, 15 U.S.C. § 717o.

appropriate means of outlawing contract provisions which are contrary to the public interest.

California submits the annexed brief on behalf of California consumers to urge that this Court recognize and approve the power of the petitioner to prohibit, through its rule-making authority, contractual provisions which it finds to be inconsistent with the public interest it is obligated to safeguard.

Respectfully submitted,

RICHARD E. TUTTLE
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J. CALVIN SIMPSON
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mission of the State of
California*

February 7, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION,	<i>Petitioner,</i>
vs.	
TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION,	<i>Respondents.</i>

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

Brief Amici Curiae on Behalf of the People of the State of California and the Public Utilities Commission of the State of California

INTRODUCTORY STATEMENT

California adopts such portions of the brief of the Federal Power Commission, petitioner herein, setting forth the Opinion Below, the Jurisdiction, the Question Presented, Statutes and Regulations Involved, and Statement of the Case.

The interest of California in this cause is fully set forth in the motion preceding this brief.

SUMMARY OF ARGUMENT

The indefinite escalation clauses contained in respondents' contracts are contrary to the public interest and violative of sound regulatory principles. The Commission has the right and duty to outlaw such provisions by its orders of general application. The decision of the Court of Appeals, in denying the Commission this power, destroys the beneficial effect the exercise of such power has had on price stability, and defeats the efforts of consumers to secure protection from excessive rates and charges.

ARGUMENT

The Proscription of Indefinite Escalation Clauses Is a Necessary and Appropriate Measure Demanded by Statutory and Regulatory Standards

Section 16 of the Natural Gas Act² empowers the Commission to make such rules and regulations as are "necessary or appropriate" to carry out the provisions of the Act. The "necessary or appropriate" language gives the Commission great latitude and broad discretion in setting down the rules and regulations which govern its functions. This power extends to procedural matters such as the orderly conduct of hearings and the proper form of filed documents; it extends to substantive matters such as the definition of parties within its jurisdiction and the issuance of temporary certificates in emergency situations. There must, however, always be a reasonable basis for the promulgation of any rule or regulation. *American Trucking Association, Inc. v. United States*, 344 U.S. 298, 314 (1953).

California will address itself to the salient reasons which compelled the Commission to proscribe indefinite escalation clauses. These reasons made the issuance of FPC Orders Nos. 232, 232A and 242 "necessary" and "appropriate" to fulfill the Commission's responsibility to implement the Natural Gas Act, and to protect the nation's consumers.

2. 52 Stat. 830; 15 U.S.C. § 717o.

1. The Indefinite Escalation Clause is an Anachronism in the Circumstances of the Nation's Economy and the Commission's Scope of Regulation.

The origin of the indefinite escalation clause in producer-pipeline company contracts predates producer regulation. Such clause first generally appeared in natural gas contracts in the early 1940's at a time when pipeline companies were paying a few pennies for an Mcf of gas, when unsold gas was "flared" in the sky, and when the great Western markets and the giant interstate pipelines serving them did not exist. The clause was allegedly designed by the unregulated producers to protect themselves against any inflationary changes in the future.

From the 1940's to the 1960's the natural gas market changed radically. In 1961 the Commission, in the celebrated *Pure* case, found that:

"purchasers of gas are numerous, consumer demand is strong, and buyers are competing early for available supplies of gas. In our judgment, in the light of continuing increases in the price of gas in recent years and the present high level of prices, escalation clauses such as *Pure's* have by now outlived whatever economic function they may have had." *The Pure Oil Co.*, 25 FPC 383, 391 (1961), affirmed *The Pure Oil Co. v. Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962).

Vast natural gas markets have now developed across the nation. California alone purchases over 300 million dollars of interstate natural gas annually. A great natural gas industry, distinct from the oil and the petroleum products industries, has grown with these markets. Consequently, there no longer exist the so-called uncertainties of the 1940's. The nation's projected population and general growth have given certainty to the future of the industry.

The indefinite escalation clause, as an inflationary safeguard, is an anachronism today. Price can be *definitely* stated and fixed for the full term of a contract. The Commission, in the exercise of its judgment, has recognized this. Moreover, with the initiation of the

regulation of producers, the Commission is the overseer of "just and reasonable" rates and, as an expert body, is qualified to judge the inflationary or deflationary impact the future may have on long-term natural gas contracts.

The Commission has embarked upon an area rate program (See *Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963)), wherein individual company producer costs have been excluded in determining area prices. While the area program is only an experiment, indefinite escalation in individual contracts under individual circumstances is incompatible with the Commission's area approach.

2. Indefinite Escalation Clauses Result in a Monumental Administrative Burden, a Confused Regulatory Situation, and Chaotic Pricing.

Indefinite escalation clauses are patently inconsistent with proper administration and effective regulation. Whether or not a rate filing based on an indefinite escalation clause is contractually authorized is invariably a matter of dispute. Consequently, the Commission must in each instance initially decide if the escalation conditions provided in the contract have occurred. The Commission's files are inundated with rate increase applications premised on the "triggering" of indefinite escalation clauses, where the Commission must first delve into contract problems before reaching the merits of the applications.

In the *Pure* case, 25 FPC 383 (1961), where a favored nation clause³ was involved, the Commission had to decide first if the clause had been activated under a complex factual situation. A special hearing was necessary for this purpose.

In *Phillips Petroleum Co.*, 24 FPC 537 (1960), the Commission was unable to decide two of Phillips' rate increases based on spiral

3. A favored nation clause provides that the producer may file for a rate increase whenever the pipeline company pays a higher price to another producer in a specified geographical area.

escalation clauses⁴ because the increases were interrelated with the unsettled rates of a pipeline company. This Court, on reviewing the *Phillips* case, did not take action on the clauses themselves since the price issue was still open. *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 303-304 (1963): The pipeline company's rates have since been determined, but the Commission must still ascertain, if it decides to give effect to the clauses, the amount of the rate increase at issue and then the merits of the increase. The dissenting opinion in the *Phillips* case stated that the spiral escalation clauses "should be completely outlawed by the Commission when the two Sec. 4(e) proceedings left pending are decided." *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 331 (1963).

Actual experience with the clauses affords the best examples of the chaos they produce. In *Shell Oil Co., et al.*, FPC Dkt. No. RI61-515, Opinion No. 382, issued March 15, 1963⁵ the Commission was faced with the following disturbing fact situation. West Texas Gathering Company sold gas to El Paso Natural Gas Company from the Permian Basin of Texas and New Mexico. This sale caused Sun Oil Company, Shell Oil Company, Hunt Oil Company and The Superior Oil Company to file for increased rates based on the asserted activation of their favored nation clauses. The above Shell and Hunt filings allegedly triggered favored nation clauses in other Superior and Sun contracts, and these companies made additional filings. Finally, Shell decided that some of its other favored nation contracts had been activated by its own former filings, and asked for still further rate increases. The Commission's opinion rejected all of the filings on the ground that they lacked contractual support, but the hearing required

4. Spiral escalation clauses provide that in the event the pipeline company buying from the producer receives a rate increase, the producer's price to the pipeline company shall be proportionally increased.

5. The matter is now on review before the United States Court of Appeals for the Third Circuit, Nos. 14431, 14434, 14506 and 14507.

13 days, 1962 pages of testimony, 43 exhibits and 50 items incorporated by reference to the Commission's files.

The *Shell* case points out the disastrous effect the successive and rapid activation of indefinite escalation clauses can have on price stability in a given area. A single filing triggered dozens of other filings. Moreover, it demonstrates the great administrative burden, which would be placed upon the Commission if it were compelled to deal with indefinite escalation clauses on a case-by-case basis.

3. Indefinite Escalation Clauses Generate Rate Increase Filings Which Have No Relationship to the Requirements of the Company Seeking the Increase.

Indefinite escalation clauses induce rate increase applications to be filed which are in no sense predicated on the requirements of the producer at the time of the filings. The Natural Gas Act imposes upon producers the obligation to charge only justifiable rates⁶. A duty is placed upon the regulated producer to ask for rates it can justify on the basis of the proved requirements of the company. Where the only justification for a filing is the activation of some indefinite escalation provision in a contract by the occurrence of some fortuitous event, the producer has no right to demand higher rates.

The United States Court of Appeals for the Ninth Circuit, when faced with substantially the same facts presented to the Tenth Circuit by the instant case, reached what California believes is the correct decision. The Court said:

"In order No. 242, the Commission also referred to, and adopted, its conclusions stated in the *Pure Oil* case, 25 FPC

6. Section 4(a) of the Act provides: "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 52 Stat. 822, 15 U.S.C. Sec. 717c(a).

383, with regard to the undesirable characteristics of such clauses. In its decision in that case, the Commission stated that such clauses are contrary to the public interest in a number of ways. They are, the Commission said, inherently unreasonable because they may be triggered by circumstances which have nothing to do with revenue needs or the reasonableness of rates. Moreover, the Commission determined in that case, such clauses have an injurious effect which cannot be fully overcome by resort to the refund provision of the Act:

"In the light of these Commission determinations, and with due regard to the experience, expertise, and neutral position of the Commission as a regulatory agency, we find nothing in Superior's arguments advanced here which would warrant a holding that the Commission acted unreasonably, arbitrarily, or capriciously in proscribing the clauses involved in our case. * * *". *The Superior Oil Co. v. Federal Power Commission*, 322 F.2d 601, 620 (9th Cir. 1963).

The obligations of natural gas companies to file for rate increases only on the basis of their requirements and the duty of the Commission to protect consumers from increases which have no justification, demand that these indefinite pricing techniques be eliminated at least in future contracts, if not in all contracts.

CONCLUSION

The outlawing of indefinite escalation clauses is essential to the regulation of an industry affected with a public interest. Since producer regulation became a reality, such clauses have been suspect and the subject of Commission scrutiny. Orders Nos. 232, 232A and 242 represent Commission action taken, after thorough examination, to relieve a situation which was repugnant to the public interest.

California prays that this Court reverse the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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February 7, 1964.

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1. The first part of the report is a general
description of the area. It is a large
area of land, mostly flat, with some
hills in the north. The climate is
warm and humid, with a lot of rain.

2. The second part of the report is a
description of the vegetation. There is a
lot of tropical forest, with many
different types of trees and plants.

3. The third part of the report is a
description of the animals. There are
many different types of animals, including
birds, mammals, and reptiles.

4. The fourth part of the report is a
description of the people. There are
many different types of people living
in the area, including farmers and
hunters.

5. The fifth part of the report is a
description of the economy. There is a
lot of agriculture, with many different
types of crops being grown.

6. The sixth part of the report is a
description of the culture. There are
many different types of cultural
activities, including music, dance, and
religion.

7. The seventh part of the report is a
description of the future. There are
many different types of future plans,
including education, health, and
economy.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, PETITIONER

v.

**TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT**

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit (R. 104-121) is reported at 317 F. 2d 796; the orders of the Federal Power Commission are reported at 28 FPC 551 and 29 FPC 378 (preliminary prints).

JURISDICTION

The judgment of the court of appeals setting aside the Commission's orders was entered on May 20, 1963 (R. 122). The petition for a writ of certiorari was filed on August 19, 1963, and granted on November 12, 1963 (R. 123). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. The Federal Power Commission summarily rejected applications for certificates of public convenience and necessity filed by respondent gas producers because they were based upon contracts containing price-changing provisions of a kind which the Commission had proscribed by regulation as contrary to the public interest.

The question presented is whether the Commission may exercise its rule-making power to refuse to consider applications for certificates for new supplies of gas under contractual arrangements (including spiral escalation clauses, favored-nations provisions and other types of indefinite pricing) which it finds are incompatible with the public interest.

2. Section 19(b) of the Natural Gas Act provides that review of a Commission order may be obtained by an aggrieved party in the court of appeals for the circuit "wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." Respondent Texaco claimed only that it was located in the Tenth Circuit.

The question presented is whether a natural gas company, for venue purposes, may be "located" outside the State of its residence, i.e., outside the State of incorporation.¹

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001-1011, the

¹ Question 2, which was reserved in the petition (p. 2, note 1) relates only to respondent Texaco.

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, and of the Commission's regulations, as amended, 18 C.F.R. (Cum. Supp. 1963), are set out in the Appendix, *infra*, pp. 51-62.

STATEMENT

The challenged regulations.—The decision below invalidates regulations of the Commission proscribing certain price-changing provisions—such as “favored nation,” price-redetermination, and “spiral escalation” clauses—in independent producer sales contracts. Thus, the court of appeals has set aside two orders of the Commission which rejected, out-of-hand, producer applications for certificates of public convenience and necessity for new sales of natural gas under contracts concededly forbidden by the agency's regulations because of their pricing provisions.

The Commission's Regulations under the Natural Gas Act, Section 154.91 *et seq.*, as amended, 18 C.F.R. (Cum. Supp. 1963) 154.91 *et seq.*, relating to producer rates, provide that independent producers subject to the agency's jurisdiction shall file their contracts as rate schedules. Section 154.93 defines pricing provisions that are permissible, declaring others to be inoperative and of no legal effect:

* * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, *any provision for a change of price other than the following provisions shall be inoperative and of no effect at law*; the permissible provisions for a change in price are:

(a) Provisions that change a price in order

to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings and, are in the area of the price in question * * *. [Emphasis supplied.]

This language originated in Order No. 232, issued March 3, 1961 (R. 12-17, 25 FPC 379, 26 Fed. Reg. 1983), as amended by Order No. 232A, issued March 31, 1961 (R. 18-21, 25 FPC 609, 26 Fed. Reg. 2850).

The same section (154.93) of the present producer rate regulations further provides that "any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions" described above "shall be rejected"; similarly, Section 157.25, relating to producer certificates, provides that an independent producer application for a certificate of public convenience and necessity "shall be rejected" if any contract submitted in support of it contains any of the forbidden provisions; and Section 157.14(a)(10)(v), relating to pipeline certificates, provides that any producer contract executed after April 2, 1962, which has this infirmity, "will be given no consideration in determining adequacy" of a pipe-

line company's gas-supply showing in support of a certificate application. These three implementing provisions were added to the regulations by Order No. 242, issued February 8, 1962 (R. 22-25, 27 FPC 339, 27 Fed. Reg. 1356).

History of the regulations.—Even before the *Phillips* decision,² the need for general regulations to deal with the problem of indefinite price-changing provisions in producer contracts had been recognized. On May 12, 1954, the Commission had initiated a rule-making proceeding³ to determine whether such clauses⁴ "have any reasonable relation to the economics of producing, gathering, or transporting natural gas, and whether rules dealing therewith should be adopted." Particular reference was made to the possibility of adopting a rule "in connection with the issuance of certificates" declaring contracts containing such provisions "not to be acceptable as evidence of gas supply, or in connection with rate-making⁵ whereby increased payments made under escalator provisions but having no relation to additional or improved service or gas supplies to an interstate transporter could be disallowed."

² *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (June 7, 1954).

³ 19 Fed. Reg. 2768.

⁴ The various kinds of indefinite pricing clauses are described *infra*, p. 15, note 14.

⁵ At that time, preceding the *Phillips* decision, the only certificate or rate proceedings that were being held were those relating to pipelines.

In December, 1954, this rule-making proceeding eventuated in a provision stating (Order 174B, 13 FPC 1576, 18 C.F.R. 157.25):

* * * Escalation clauses in contracts submitted hereunder on or after May 1, 1955, will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) Provision is made for adjustment of the price of the seller by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas.

In 1956, the Commission initiated another rule-making proceeding looking to the adoption of a rule that would bar all new producer contracts containing indefinite pricing clauses. The notice was published in the Federal Register on April 12, 1956 (21 Fed. Reg. 2388) and mailed to interested parties including State and regulatory agencies (R. 12, 25 FPC at 380). In the notice (21 Fed. Reg. 2388), the Commission announced that it proposed to amend its regulations governing independent producers by designating certain types of contracts for the sale of natural gas which would not be accepted for filing as rate schedules. Specifically, it proposed to reject contracts containing provisions calling for price adjustments keyed to "(a) escalator clauses based on price indices or changes in the price received by the purchaser upon resale ["spiral clauses"], or (b) the payment or offer of payment of higher prices by the

purchaser or other purchasers in the same or other producing areas to the same or other sellers ["favored-nation" and price redetermination clauses]."

The notice invited comments on or before June 1, 1956 (21 Fed. Reg. at 2389). Nearly eighty responses, including comments from the present respondents, Texaco and Pan American, were received by the Commission, some supporting and some opposing the proposed rule.*

Nothing was decided in that rule-making proceeding, however, until the question of the lawfulness of indefinite pricing provisions was raised and tried in the *Pure Oil* case. That case arose out of increased rates tendered for filing in January 1959 under the claimed authority of favored-nation clauses and decided March 3, 1961, *Pure Oil Co.*, 25 FPC 383, ^{was} affirmed, 299 F.2d 370 (C.A. 7).¹ The same day it issued its decision in that case, the Commission issued Order No. 232 (R. 12-17, 25 FPC 379) in the rule-making which it had initiated in 1956.

In Order 232, the Commission found (R. 13) that long-term gas supply contracts containing "indefinite escalation clauses" (which it defined as all price es-

* At the time of making these comments, the names of the companies were The Texas Company and ~~Standard~~ ^{Standard} Oil and Gas Company, respectively. For convenience of the Court, respondents' comments in this and subsequent rule-making proceedings have been excerpted from the administrative record and lodged with the Clerk.

¹ While that case was decided on the ground that the favored-nation clause there involved had not been triggered, the Commission, as stated in Order No. 232, explained there why it regarded indefinite escalation clauses to be contrary to the public interest. *Pure Oil Co.*, 25 FPC 383, 387-391.

calation provisions other than those calling for increases of specific amounts at definite dates or those intended to reimburse the seller for all or any part of changes in production, severance or gathering taxes levied on the seller) "have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies," and, for the reasons elaborated in *Pure Oil*, were contrary to the public interest. Accordingly, it amended the producer rate regulations by adding (1) the definitions of "definite" and "indefinite" escalation clauses to Section 154.91 of the regulations and (2) the proviso to Section 154.93, declaring that any provision for a change of price based on an indefinite escalation clause in a contract filed on or after April 3, 1961, would be "inoperative and of no effect at law" (R. 14, 25 FPC at 381).

Order 232 also provided that the amendments to the regulations therein promulgated would become effective on April 3, 1961, and that any interested person could submit written views or comments to the Commission by March 20, 1961, R. 14, 25 FPC at 381. On March 31, 1961, the Commission, upon consideration of more than thirty further comments, including those of Texaco and Pan American, issued a modification, designated Order 232A. In this order, the Commission found that it "appears that elimination of all indefinite escalation provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-

term contracts, we should permit future contracts to contain limited price-redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and therefore, controlled)" (R. 19). It also concluded that the amendment to the regulations should apply only to contracts "executed" on or after April 3, 1961 (under Order 232 the amendment would have applied to contracts "filed" on or after that date, whenever executed)."

Order 242 (which put the rule in its present form) was initiated in October 1961—again by a notice of proposed rule-making (26 Fed. Reg. 9732) and the mailing of notices to interested persons, including natural gas companies and State and federal agencies (R. 23, 27 FPC 339). In that notice, the Commission stated (26 Fed. Reg. 9732, 9733):

Having found in Order No. 232A that indefinite escalation provisions " * * * are generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies * * * ", it appears that no useful purpose can be served by the Commission's acceptance of contracts containing indefinite price escalation provisions or of applications relying upon contracts having such

* A petition to review Order Nos. 232 and 232A was dismissed for lack of jurisdiction. *Sun Oil Co. v. Federal Power Commission*, 304 F. 2d 293 (C.A. 5), certiorari denied, 371 U.S. 861.

provisions as proof of the applicants' gas supply.*

Following receipt of thirty-six responses, again including comments from Texaco and Pan American, the Commission, on February 8, 1962, issued its order (R. 22-25, 27 FPC 339) explaining that indefinite price-changing provisions hamper effective rate regulation, and that the existing regulation and the new amendments were necessary to remove a serious impediment to the performance of the Commission's statutory duties.⁹

The present cases.—On the basis of its regulations, the Commission rejected applications of respondents Texaco and Pan American for certificates of public convenience and necessity because they depended upon

*The specific amendments proposed were substantially the same as those eventually adopted in Order 242, except that the proposed regulations would have rejected rate schedules or certificate applications filed after the specified date, rather than only those executed after the specified date.

⁹A number of producers including Pan American, filed applications for rehearing of Order 242. After these were denied on April 4, 1962 (27 FPC 666), six petitions for review of that order were filed. Each of these has now been dismissed on motion of the Commission, three in the Fifth Circuit (*Hunt Oil Co. v. Federal Power Commission*, 306 F. 2d 878), one in the Third Circuit (*Shell Oil Co. v. Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962, unreported), and two by the part of the opinion of the Tenth Circuit in this case relating to C.A. 10 Nos. 7002, 7119 (R. 112-114). The Tenth Circuit held that those petitioners were not "aggrieved" within the meaning of Section 19(b) of the Gas Act, pointing out that the "statute is strained if review may be had of a negative order of general applicability by a party who has not been, and may never be, affected by the order except in a theoretical manner." R. 114. Pan American is challenging that dismissal in *Pan American Petroleum Corp. v. Federal Power Commission*, No. 237, this Term, now pending on petition for certiorari.

contracts containing impermissible price-changing provisions.¹¹ In their applications for rehearing (R. 65-69, 91-98), respondents challenged the validity of the regulations. Neither company denied that its contract contained an impermissible price-changing clause (as therein defined); and neither requested a waiver of the regulations, as permitted by Section 1.7(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. (Cum. Supp. 1963) 1.7(b), *infra*, p. 60.

The court below (in its Nos. 7217 and 7303) set aside the Commission's orders, holding (R. 120-121) that the "summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review."¹²

In No. 7217, the court also denied the Commission's motion to dismiss for lack of venue, which alleged that Texaco was not "located" in the Tenth Circuit within the meaning of Section 19(b) of the Gas Act, *infra*, p. 58. The Commission had contended that under Section 19(b), which permits a petition for review of a

¹¹ By letter order of October 5, 1962, in Docket No. CI63-289, to Texaco (R. 63-64) and letter order of February 19, 1963, in Docket No. CI63-367, to Pan American (R. 89-90).

¹² A Commission order rejecting a certificate application based on a contract containing price-changing provision proscribed by the same regulations was affirmed by the Ninth Circuit in *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601, pending on petition for certiorari, No. 680, this Term.

Commission order to be filed in the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business," a corporation is "located" only in the State in which it is incorporated. Rejecting this, the court held that a company's location depends upon the facts of the case with respect to the business done within the circuit. Explaining its conclusion that venue existed, although Texaco did not have its "principal place of business" in the Tenth Circuit, the court explained that Texaco "conducts extensive operations in the Tenth Circuit and has two of its seven production divisions therein," and "[m]ore importantly, in each of the cases ["] the gas sold is produced in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit" (R. 112).

SUMMARY OF ARGUMENT

I

Faced with the fact that indefinite pricing provisions in contracts for the sale of gas (including favored-nation and spiral escalation clauses) were generating a flood of rate filings apparently unrelated to the legitimate economic needs of producers and that these were clogging the processes of regulation, the Federal Power Commission adopted rules specifying for the future the types of price-changing provisions which it would regard as acceptable (proscribing all others). It provided further that applications for

¹³ Texaco had filed three petitions for review, but two were dismissed for lack of jurisdiction. The Commission had also challenged venue in each of those cases on the same grounds.

certificate authority (the occasion for this litigation) and filings for rate increases would be rejected if grounded upon contracts containing provisions of the proscribed types.

The court below has not reviewed the reasonableness of the FPC rules but has concluded that the Commission lacked power to proceed by resort to rule-making, notwithstanding a broad statutory grant of authority to promulgate general rules "necessary or appropriate to carry out the provisions" of the Natural Gas Act.

The fundamental objection, in the view of the court below, is that the substantive sections of the Act defining the Commission's powers of certification and rate-making affirmatively provide for a hearing. Provision for a hearing, however, does not preclude an agency from particularizing statutory standards and barring at the threshold those who concededly do not meet the prerequisites and fail to suggest any consideration which would conceivably justify a waiver of them. As held by this Court in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, involving an analogous situation under the Communications Act, there is no deprivation of the right to a full hearing when, on the agreed facts, the standard embodied in the rule is unsatisfied; in that circumstance, there are no further facts to ascertain.

Nor is there force to the argument that, in the absence of an adjudicatory proceeding, there is no adequate record for purposes of court review. To begin with, a general rule within the scope of an agency's authority enjoys the presumption of validity

which attaches to a statute. Moreover, the administrative record made in the rule-making proceeding (which fully complied, in this instance, with the requirements of Section 4(b) of the Administrative Procedure Act) provides basis here, no less than it did in *Storer*, for a determination whether the regulations have rational foundation.

As to the substantive authority of the Commission (as distinguished from the question whether it was obliged to proceed case-by-case rather than by rule), there can be no question. Under Sections 4 and 5 (the rate-making sections), the Commission has specific authority to modify contracts affecting rates. Its authority under Section 7 is surely no less, for in exercising the power of certification the Commission is bound to give effect to all provisions of the Act. Since the protection of consumers is the touchstone of the statute, contracting practices which bear on the applicant's future rates assume particular importance in the Commission's determination of the public convenience and necessity.

II

The Court of Appeals also erred in failing to dismiss Texaco's petition for lack of venue. Under Section 19(b) of the Natural Gas Act, a person aggrieved may seek review in the circuit "wherein the natural-gas company to which the order relates is located or has its principal place of business" or in the District of Columbia. Texaco is a Delaware corporation and there is no claim that its principal place of business is within the Tenth Circuit. All indicia point to the conclusion that Congress used the term "located," as

it appears both in the Power and Gas Acts, in the sense that it is traditionally used in venue provisions—as specifying residence or domicile. In the case of a corporation, this means the State in which the company is incorporated.

ARGUMENT

INTRODUCTION

Without reaching the question of the reasonableness of the Commission's indefinite-pricing regulations, the decision below held them invalid on the ground that the subject is one the Commission cannot deal with by general rule but must decide case by case. While we shall, therefore, not discuss their reasonableness, we think it will be helpful to set the regulations against the background of the problems which led to their promulgation.

Indefinite pricing clauses—contractual provisions characteristically designed to move the producer's price to the highest prevailing level—came into

“Such clauses are of several kinds. “Favored-nation clauses” provide for increases whenever a higher price is paid to any other supplier by the same purchaser (“two party”), or by any purchaser (“three party”). “Redetermination clauses” generally provide that the producer's price shall be raised at specified times to reflect the average of the highest prices then being paid. Other similar types include “bona fide offer” type of “favored-nation clauses”, “commodity-index-adjustment clauses”, and “renegotiation clauses”. See *Pure Oil Co.*, 25 FPC 383, 388. A different and less prevalent form of indefinite pricing clause is the “spiral clause,” such as was under consideration in *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 301, note 9; see 24 FPC 537, 576-7, 593, 756-7. Spiral clauses generally provide for increases in producers' rates in proportion to increases in the pipeline's rates.

widespread use during the "sellers' market" for natural gas which accompanied the post-war proliferation of pipelines." It was not, however, until the eve of the *Phillips* decision¹⁴ (ruling that the Commission has power to regulate the rates of independent producers) that their prevalence evoked the first expression of Commission concern." By the time that this Court had settled the Commission's responsibilities in the realm of producer rates the flood of increased rate filings (to which the indefinite pricing clauses greatly contributed) was already at high crest.

¹⁴ See, e.g., *Hearings on Natural Gas Act (Exemption of Producers) before House Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess., p. 538; 96 Cong. Rec. 4022-4028; Neuner, *The Natural Gas Industry* (1960), p. 80-111. Both reports made in 1948 on the Commission's Natural Gas Investigation, G-580, note the existence up to that time of a "buyers' market" for natural gas. Smith-Wimberly Report, p. 185-188, Olds-Draper Report, pp. 136-137. The sharp rise in the rate of increase in interstate transmission of natural gas beginning in 1947 (see F.P.C. Annual Report, 1954, p. 21) was shortly followed by a corresponding rise in prices. While the 1949 F.P.C. Annual Report (p. 14) spoke of "declining prices," the 1950 Report (p. 2) noted "several requests for rate increases," and the 1951 Report (p. 2) "a continuation of the upward trend in wholesale prices of natural gas which commenced during the previous fiscal period." The rise became "precipitous" until prices leveled off in 1961 (F.P.C. Annual Report, 1962, pp. 84-85).

¹⁵ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, decided June 7, 1954.

¹⁶ *Supra*, pp. 5-6; F.P.C. Annual Report, 1954, p. 109. In 1955, 735 producer rate increases under escalation (including fixed periodic escalation clauses as well as indefinite pricing clauses) and renegotiation clauses were filed. F.P.C. Annual Report, 1955, pp. 109-110. By 1960 the number had risen to 2,307. F.P.C. Annual Report, 1960, p. 78.

A number of factors entered into the problem confronting the Commission. To begin with, the timing of increased rate filings under indefinite pricing clauses is often determined by fortuitous circumstances quite unrelated to the producer's economic need, *e.g.*, that another producer has made a sale at a high price (R. 24).

Indefinite pricing provisions impair the Commission's fulfillment of its certificate obligations as well as its rate-making responsibilities. Consideration of initial prices in certificating producer sales, as required by *CATCO*,¹⁸ will be of limited efficacy if the Commission is unable to ascertain when the producer will be able to file for an indefinite increase. And where a proposed construction or enlargement of a pipeline depends for any substantial percentage of its gas on contracts containing such clauses it is virtually impossible for the Commission to estimate its economic feasibility, for there is no predictable ceiling upon the cost of supply.

The interacting and cumulative effect of such contracts compounds the problem. When many contracts in a given area contain "indefinite" clauses, a single out-of-line new price (or increase under a spiral clause) can start a chain reaction throughout the area (R. 24).

Another serious factor is that the Commission often must determine whether the alleged triggering transaction does in fact authorize the tendered increase. See *United Gas Pipe Line Co. v. Mobile Gas Service*

¹⁸ *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378.

Co., 350 U.S. 332. These questions of contract interpretation are themselves complex and productive of regulatory delay. In one such case, seven years elapsed between the date of the tender of the rate for filing (Nov. 14, 1954), and the close of the review proceedings in the courts (Nov. 24, 1961).¹⁹ Thirty-eight other filings tendered four years ago have only recently been argued in the Third Circuit.²⁰ These delays in turn hold up disposition of proceedings involving other increased rates submitted under indefinite pricing clauses claimed to have been triggered by the rates in the delayed cases.

In short, the uncertainty and instability generated by indefinite pricing demanded a mechanism of con-

¹⁹ *Shell Oil Co.* 18 FPC 617, 19 FPC 74, set aside *sub nomine Shell Oil Co. v. Federal Power Commission*, 263 F. 2d 223 (C.A. 3), reversed *sub nomine Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263; on remand, affirmed *sub nomine Shell Oil Co. v. Federal Power Commission*, 292 F. 2d 159 (C.A. 3), certiorari denied, 368 U.S. 915.

²⁰ *Shell Oil Co., et al.*, 29 FPC 498, petitions for review pending: *Shell Oil Co. v. Federal Power Commission*, C.A. 3 No. 14431, *Sun Oil Co. v. Federal Power Commission*, C.A. 3 No. 14434, *Hunt Oil Co. v. Federal Power Commission*, C.A. 3 No. 20526, transferred, C.A. 3 No. 14506, *Superior Oil Co. v. Federal Power Commission*, C.A. 3 No. 20521, transferred, C.A. 3 No. 14507.

See, also, *Warren Petroleum Corp. v. Federal Power Commission*, 282 F. 2d 312 (C.A. 10); *Kerr-McGee Oil Industries, Inc. v. Federal Power Commission*, 260 F. 2d 602 (C.A. 10); *Cities Service Gas Producing Co. v. Federal Power Commission*, 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911.

trol—one which would be prompt and comprehensive and avoid a threatened breakdown of regulation.²¹

I

THE COMMISSION'S REJECTION OF THE CERTIFICATE APPLICATIONS ON THE BASIS OF ITS GENERAL REGULATIONS WAS A PROPER EXERCISE OF THE RULE-MAKING AUTHORITY

A. THE PROHIBITION OF INDEFINITE PRICING CLAUSES WAS AN APPROPRIATE SUBJECT OF GENERAL REGULATION

Section 16 of the Natural Gas Act vests the Commission with broad authority to issue such rules of general applicability "as it may find necessary or appropriate to carry out the provisions" of the Act. Relying upon that power, the Commission has stated that it will reject certificate applications (and also rate filings) based upon contracts which include certain types of proscribed price-changing provisions. The court below has ruled that this may not be done. Its opinion suggests (1) that resort to rule-making, rather than case-by-case adjudication, may impinge upon producers' substantive rights, (2) that the hearing requirements of the Act preclude rules of the kind

²¹ While attempting to provide an effective remedy, the Commission was careful not to limit the level of prices that may be contracted for or charged, or the number of times a producer may seek to increase a particular rate. Nor did it preclude a producer from selling under a short-term contract, at the termination of which it would be free to file rate changes (see *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 155) or negotiate a new contract. See, e.g., *Sun Oil Co. v. Federal Power Commission*, 364 U.S. 170. Finally, it did not prohibit renegotiation of an existing contract, although it did bar contract provisions compelling "renegotiation".

here in question, and (3) that the rule-making process does not permit effective judicial review of the underlying issues which are at stake. We consider these points in turn.

1. There is no substance to the suggestion of the court below that the Commission, by using its rule-making power to implement the public convenience and necessity standard of Section 7 (or the just and reasonable standard of Sections 4 and 5) has denied the producers a substantive "right to contract" (R. 113, 121), in derogation of the principle that the Commission may only "review", not "make", contracts.

As we discuss more fully, *infra*, pp. 33-38, the Commission would certainly be free under Section 7 to deny an application for a certificate on the ground that it was based on contract provisions found incompatible with the present or future public convenience and necessity. Alternatively, the Commission could grant a certificate in such circumstances on condition that the objectionable contract provisions be eliminated. And the Commission could modify a contract affecting a rate subject to its jurisdiction, if that were necessary to make it just and reasonable (*infra*, pp. 32-33). In any such case, the Commission would merely be reviewing a contract made by the company to determine whether it meets the statutory test.

Application of the Commission's present regulations affects a producer's "right to contract" no more than would such a case-by-case determination. In choosing to proceed by promulgation of a rule of general applicability the Commission has not prevented producers from entering into contracts on whatever

terms they can obtain any more than if it followed a case-by-case approach. For the rule has merely made it plain that only under exceptional circumstances—which can be brought to the Commission's attention in a request for a waiver of the rule—will it grant certificates for sales under contracts of the proscribed kind.

The Tenth Circuit's decision that the Commission may proscribe contract clauses not conforming to the standards of the Act only on a case-by-case basis would have the effect of requiring the Commission to repeat, in hearing after hearing, conclusions which apply equally to all of the indefinite price-changing provisions with which its regulations deal. Such proliferation of hearings cannot fail to inflict serious damage upon the processes of regulation where, as here, there are hundreds, or thousands, of individual producers involved, with no significant variations in the problems presented by their several situations; where the burden on the individual producer of the case-by-case approach would be, for most of them, as disproportionate to their interests as it would be unreasonably costly for the Commission; and where the very interacting and cumulative effect of such clauses in large numbers of contracts greatly compounds the problem calling for remedy.

As this Court has stated, the "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency". *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 203. In view of the circumstances

described, we submit that it was plainly a sound exercise of the Commission's discretion to give concreteness to the statutory standards by resort to its general rule-making powers under Section 16 of the Natural Gas Act.

2. Aside from the alleged deprivation of a substantive right, the decision below rests principally on the court's view that the Commission may not summarily reject a certificate application because Section 7 calls for hearing prior to Commission action on such an application. But, as the Ninth Circuit has recently noted in a case involving the identical issue,²² this Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, provides a complete answer.²³

In *Storer*, the Federal Communications Commission, pursuant to its general rule-making authority, issued an order amending its multiple ownership rules for radio and television stations. Storer, a broadcaster whose ownership of seven standard radio and five television stations constituted, under the amended rules, an automatic disqualification for further licensing, challenged the rules in the court of appeals on the ground that they were in conflict with Section 309 of the Communication Act, 47 U.S.C. 309, requiring (a) that a license be granted where the public interest would be served, and (b) that a hearing be held before denial of an application. The court of

²² *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601, pending on petition for certiorari, No. 689, this Term.

²³ The court below failed to discuss *Storer*, although the bearing of that case had been extensively argued both orally and in the briefs, and the court cites the case in a different connection (R. 113, 317 F. 2d at 803).

appeals invalidated the general order, holding (220 F. 2d 204, 208) that "any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." "

In this Court, the Communications Commission argued, as the Power Commission does here, that rules may validly give concreteness to a standard of public interest; that the right to a hearing does not apply where an applicant admittedly does not meet those standards since there would be no further facts to ascertain; and that the agency's regulations afforded applicants an opportunity to allege exceptional circumstances which might, in individual cases, warrant waiver of the rules (351 U.S. at 201). This Court agreed, reversing the decision below upon the following analysis (351 U.S. 202-203, 205):

We do not read the hearing requirement * * * as withdrawing from the power of the Com-

"The court of appeals went on to explain (220 F. 2d at 208-209):

* * * [T]he Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances² may differ widely from case to case. * * *

It is conceivable that in some circumstances, common ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public convenience, interest or necessity." * * *

mission the rule-making authority necessary for the orderly conduct of its business. As conceded by Storer, "Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest." The challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rule-making authority. 47 U.S.C. § 154(i) and § 303(r) grant general rulemaking power not inconsistent with the Act or law.

• • • We read the Act and Regulations as providing a "full hearing" for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309(b), n. 5, *supra*, would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is

aggrieved by a refusal, the way for review is open."

See, also, *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190; *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 289, note 7; *American Trucking Associations, Inc. v. United States*, 344 U.S. 298; *Transcontinent Television Corp. v. Federal Communications Commission*, 308 F. 2d 339 (C.A.D.C.); *Logansport Broadcasting Corp. v. United States*, 210 F. 2d 24 (C.A.D.C.).

As the Ninth Circuit found in the *Superior* case (322 F. 2d at 612-613), there is no significant difference between the statute involved in *Storer* and that involved here so far as the hearing requirements and rule-making authority are concerned. In *Storer*, as here, the challenged rule dealt with substantive standards rather than procedure. Moreover, the rules of the Power Commission (Section 1.7(b) of the Commission's rules, *infra*, p. 60), like those of the Communications Commission, permit applicants to seek amendment, waiver, or repeal of its rules and, when reasons are set forth sufficient on their face to provide a basis for such relief, entitle them to a hearing. Similarly, they would have been granted an adjudicatory-type hearing if at any point they had raised any substantial issue as to the applicability of the regulation in the particular circumstances. See *Atlantic*

* In *Denver Union Stock Yard Co. v. Producers' Livestock Marketing Association*, 356 U.S. 282, this Court reiterated the view that Congress does not intend to require a hearing when no purpose would be served.

Refining Co., 28 FPC 469, order of September 13, 1962, granting rehearing of rejection order."

Neither respondent has ever asserted, however, that the regulation, if valid, would not cover, or for some reason ought not be applied to, the escalation clauses in its contract. And the Natural Gas Act does not require, any more than did the provisions of the Communications Act involved in *Storer*, a full evidentiary hearing in each case merely to redetermine the wisdom of the agency's general rule or to re-appraise the "legislative facts" on the basis of which that rule was adopted. As Judge Learned Hand stated (*National Broadcasting Co., Inc. v. United States*, 47 F. Supp. 940, 945 (S.D. N.Y.), affirmed, 319 U.S. 190):

* * * Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in

"In another case, the Commission has granted rehearing to consider whether the regulations here at issue should be modified to permit escalation clauses in producer contracts which allow producers to change the price under a particular contract at will, subject only to Commission regulation. *Atlantic Refining Co.*, 29 FPC 384. In granting rehearing, the Commission explained that, while such a provision was clearly prohibited by its regulations, "the propriety of such a provision, which is not typically found in contracts between independent producers and pipelines, was not a matter which engaged the Commission's consideration at the time it adopted its present rule."

one instance, would in any event become a precedent for the future."

See, also, *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194; 1 Davis, *Administrative Law Treatise* (1958), pp. 407-411.

3. The Court of Appeals states further (R. 119-121) that, in the absence of "adversary hearings", there can be no effective judicial review. As the Ninth Circuit pointed out in the conflicting *Superior* decision, 322 F. 2d at 619, the Tenth Circuit's approach would require "all general rule-making to include a trial-like hearing."

There is, of course, no constitutional right to a hearing where the subject is legislation or general rule-making. See *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441; *Bowles v. Willingham*, 321 U.S. 503, 519-520. Moreover, the Administrative Procedure Act does not call for an evidentiary hearing. Section 4(b) requires that substantive rules of general applicability should be promulgated after notice and opportunity by interested persons to submit comments, data and views. This was the procedure concededly followed here, as it was in *Storer*. And certainly in *Storer* this Court found no obstacle

²⁷ The Commission's regulations permit rate filings to be made simultaneously with applications seeking certificate authorization. Such rate filing is obviously dependent upon the issuance of certificate authority and may be rejected if the certificate application is rejected. See *W. J. Dillner Transfer Co. v. United States*, 214 F. Supp. 941 (W.D. Pa.).

Moreover, rejection of unauthorized rate filings without a hearing is also firmly established. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 322, 347; *Sun Oil Co. v. Federal Power Commission*, 364 U.S. 170.

to judicial review of the reasonableness of the Federal Communications Commission's multiple ownership rules.²⁸ See, also, *Public Service Commission of New York v. Federal Power Commission*, C.A.D.C. No. 17673, decided January 2, 1964 (1956 rule prescribing standards for issuing temporary authorizations to producers found valid); *Transcontinent Television Corp. v. Federal Communications Commission*, 308 F. 2d 339 (C.A.D.C.) (rule-making record held to support rule);²⁹ *Functional Music, Inc. v. Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.), certiorari denied, 361 U.S. 813 (stated justification held

²⁸ It is immaterial that in *Storer* it was the general order promulgating the rule which was under review, whereas here it is a subsequent order applying the rule. In either case, it is the underlying rule, either on its face or as applied, which is at issue; and in either event the court, in deciding that issue, may review the written views and comments submitted to the Commission in connection with the rule-making proceeding. Rules, like legislation, are frequently reviewed when applied. See e.g., *Public Service Commission of New York v. Federal Power Commission*, C.A.D.C., No. 17673, decided January 2, 1964; *Functional Music, Inc. v. Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.); certiorari denied, 361 U.S. 813; *Dyer v. Securities and Exchange Commission*, 266 F. 2d 33 (C.A. 8), certiorari denied, 361 U.S. 835. Indeed, until it is applied, the complaining party may have no standing to challenge the rule.

²⁹ In that case, the court held a company was not entitled to an evidentiary hearing before denial of renewal application where the renewal application was for a channel no longer available as a result of Commission rule-making proceedings. It explained (308 F. 2d at 343), "we bear in mind that we are concerned here only with the type of hearing required, not with the right to a hearing. The latter is conceded. Marietta was heard, though in accordance with rule making procedures. The Commission having considered and decided the deintermixture issue in the rule making proceedings should not be required to cover again the same ground. * * *

not to support rule); cf. *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284.

The Tenth Circuit has failed to recognize that "where the regulation is within the scope of authority legally delegated, the presumption of the existence of the facts justifying its specific exercise" is no less applicable to an administrative rule than to a statute. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186. See, also, *Superior*, *supra*, 322 F. 2d at 619 (C.A. 9). Respondents' burden in challenging a rule is to show that "the Commission had no reasonable ground for the exercise of [its] judgment." *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 314.²⁰

B. THE REGULATIONS ARE NOT INVALID FOR LACK OF ADEQUATE FINDINGS OR BECAUSE OF INCONSISTENCY WITH SUBSTANTIVE PROVISIONS OF THE ACT

1. The Court of Appeals also held (R. 119) that the Commission's ultimate finding²¹ that the prescribed price-changing provisions are inconsistent with the "public interest" is legally insufficient to sup-

²⁰ The formal record in the instant cases does not include the written views and comments constituting the record in the rule-making proceedings which resulted in Commission Orders Nos. 232A and 242. The court of appeals was free, however, to take judicial notice of the public record or require the Commission to produce it if that had been deemed necessary to appraise the reasonableness of the rules under review.

²¹ It should be noted that, in issuing rules of general applicability, an administrative agency is not required to make formal findings but only to give "a concise general statement of their basis and purpose." Section 4(b) of the Administrative Procedures Act, *infra*, pp. 51-52.

port the rule because it is not cast in the statutory terms—"just and reasonable" (Section 4 and 5) and "public convenience and necessity" (Section 7). Although the statutory language was not parroted, it is nonetheless clear that the Commission's explanation of the reasons for the rule was directly responsive to the governing statutory standards. In *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 355, this Court observed that the validity, or the justness or reasonableness, of a contract depends upon whether it adversely affects the "public interest." See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344, 345; *Mississippi River Fuel Corp. v. Federal Power Commission*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 355 U.S. 904. Indeed, in countless certificate proceedings, "public interest" has similarly been equated with "public convenience and necessity." See, e.g., *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24, 29, 30; *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 390-391, 392.

This Court rejected a similar contention only last term in *Wisconsin v. Federal Power Commission*, 373 U.S. 294. There the Commission had terminated a number of Section 4(e) proceedings without making a finding in *haec verba* that the increased rates in question were "just and reasonable." The Court, concluding that the basis for the termination had nevertheless been properly explained, observed that the contention as to lack of finding "goes to the form

and not the substance of what the Commission did." *Id.* at 305.

2. As noted earlier, there is some suggestion in the opinion below that the Commission has no power to formulate substantive rules with respect to provisions of contracts. Without doubt, the Commission lacks power to "make" contracts in the first instance. Nor in ordinary circumstances can it approve proposed rate increases which exceed the levels to which the contracting parties have agreed. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332;²² cf. *Federal Power Commission v. Sierra Pacific*

²² Although this Court did not have any question before it in *Mobile* of the Commission's power to carry out the substantive provisions of Sections 4 and 5 by a general regulation under § 16, Mr. Justice Harlan, writing for the majority, was careful to avoid any implication that the Commission lacked such power (350 U.S. at 344):

* * * [D]enying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. * * *

The issue in that case was only whether a natural gas company had the right to file an increased rate pursuant to Section 4(d) of the Act when its contract prohibited that filing. Since the Court held that the Act was not intended to prohibit private rate contracts, it concluded that a seller of natural gas could not invoke the provisions of the Act for the filing of increased rates so long as a contractual inhibition was present. The Court was concerned with the powers of the seller of natural gas, not with the power of the Commission. As we have seen, the Commission's paramount power was recognized and there is nothing in *Mobile* that in any way limits the express powers over contracts conferred by Section 4 and 5 of the Act. See also the Commission's brief in *Federal Power Commission v. H. L. Hunt, et al.*, No. 273, this Term, pp. 29-33.

Power Co., 350 U.S. 348. However, as passingly observed in the preceding discussion of the Commission's ability to proceed by rule, rather than case-by-case, we believe that there can be no question of the Commission's authority to modify (or require the modification of) contracts upon a determination that they fail to satisfy the statutory criteria. At this juncture, we undertake to demonstrate that this is true both under the rate-making provisions of the Act (Sections 4 and 5) and those which relate to the process of certification (Section 7).

(a). Section 5(a) of the Act provides that in passing on existing contracts affecting rates:

Whenever the Commission, after a hearing * * * shall find that any * * * *contract* affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable * * * *contract* to be thereafter observed and in force, and shall fix the same by order * * * [emphasis added].

Section 4(e) provides in turn that the Commission may make such orders with respect to a suspended "schedule" (which the Commission has defined as the contract²³) "as would be proper in a proceeding initiated after it had become effective," i.e., in a proceeding initiated pursuant to Section 5(a). See *United Gas*

²³ F.P.C., Regulations Under the Natural Gas Act, § 154.93 (18 C.F.R. 154.93). Section 16 of the Gas Act expressly authorizes such definitions.

Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 341."

(b.) It is no less clear that the Commission may require modification of contracts as a condition of granting a certificate under Section 7 (the situation directly involved in the case at bar). Indeed, under that section the Commission must give full effect to all provisions of the Act and the policies which they reflect. See, e.g., *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (CATCO); *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241; cf. *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 215-220. In the CATCO case, this Court specifically held that Sections 7 (c) and (e) of the Gas Act require the Commission to control the terms and conditions under which natural gas companies may initiate proposed sales at wholesale of natural gas in interstate

"This power to modify contracts which was recognized by the Ninth Circuit in *Superior*, 322 F. 2d at 618, has also been given effect by other courts of appeals. Thus, in *Mississippi River Fuel Corp. v. Federal Power Commission*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 355 U.S. 904, the court sustained a Commission order requiring United Gas Pipe Line Company to disregard a contractual obligation to provide Mississippi with all its natural gas requirements and to insert a take-or-pay clause in the contract. In *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60 (C.A. 6), certiorari denied, 350 U.S. 987, the court recognized the Commission's authority to free Panhandle of a contractual duty to supply Michigan Consolidated with a specified amount of gas.

commerce.²⁰ If a natural gas company does not find such terms and conditions acceptable to it, it is not, of course, compelled to initiate the proposed service (360 U.S. at 387).

Since the primary aim of the statute is "to protect consumers against exploitation (e.g., *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 147; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610), it is obvious that rate questions (including the terms of related contracts) may be crucially important in certificate proceedings. See, e.g., *CATCO*, *supra*, 360 U.S. 378; *United Gas Improvement Co. v. Federal Power Commission*, 248 F. 2d 817, 823 (C.A. 9), certiorari denied *sub nom. Superior Oil Co. v. United Gas Improvement Co.*, 365 U.S. 879 and *California Co. v. United Gas Improvement Co.*, 365 U.S. 881. To be sure, in the *CATCO* case this Court held that the Commission was not required to convert every certificate proceeding into a full-blown rate case. But this hardly suggests that the Commission ought not, to the extent

²⁰ Indefinite price-changing provisions, though in existence to a limited extent in 1938, when the Act was adopted, did not become common earlier than the mid-1940's. See *supra*, p. 16, n. 15. Thus, while allowing rates generally to be initiated by contract, Congress can hardly be charged with approving or even considering all types of contract provisions that might be developed. Moreover, by specifically granting the Commission power to find contracts unlawful pursuant to Section 5(a) of the Act, Congress recognized that the Commission, not Congress, should deal with the evils arising from specific contracting practices as the Commission should find necessary or appropriate. See *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 309-310.

feasible, give careful consideration to rate and contract matters in deciding whether to issue a certificate.

It is apparent that modifications in a rate structure or in the terms of service for a proposed sale (whether stated in a tariff or contract filed as a rate schedule) can be made as readily prior to the commencement of service as later. Indeed, in many instances, this can be done with less disruptive effect upon the parties, for at that time persons objecting to the modifications can still refuse to make or participate in the proposed service if the conditions required by the public interest are unacceptable to them.

The desirability of Commission examination of rates and contracts at the outset was specifically recognized by Congress when Section 7 of the Natural Gas Act was amended in 1942 to require certificates of public convenience and necessity prior to initiation of any new jurisdictional service.³⁰ At the same time, Congress also added Section 7(e), which prescribes the standards to be applied by the Commission in deciding if a proposed act or service should be authorized. The purpose of these amendments was explained by the House Committee on Interstate and Foreign Commerce in these terms (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2-3):

* * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and

³⁰ Prior to that time, certificates were required only if a company sought to enter a market already being served by another natural gas company.

adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension *at a time when such vital matters can readily be modified as the public interest may demand.* * * * [Emphasis added.]

The Senate Committee on Interstate Commerce made a similar explanation [S. Rep. No. 948, 77th Cong., 2d Sess., pp. 1-2]:

Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to "a market in which natural gas is already being served by another natural-gas company." Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. *The characteristics of their rate structure could be studied.* * * * [Emphasis added.]

See, also, Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., pp. 5-6.

Apart from conditions with respect to proposed initial prices, the Commission has often found it necessary to require modification of tariff or contract provisions as a condition of granting certificates of public convenience and necessity. Its power to do so has been repeatedly sustained. *E.g., Florida Economic Advisory Council v. Federal Power Commission*, 251 F. 2d 643, 648 (C.A.D.C.), certiorari denied, 356 U.S. 959, affirming *Houston Texas Gas and Oil Corp.* 16 FPC 118 and 17 FPC 303 (condition requiring

elimination of cancellation provisions in transportation agreement); *Northern Natural Gas Co.*, 22 FPC 164, 174-175, 180, affirmed *sub nom. Minneapolis Gas Co. v. Federal Power Commission*, 278 F. 2d 870 (C.A.D.C.), certiorari denied, 364 U.S. 891 (certificate conditioned upon removal of clauses, permitting cancellation depending on price relationship of gas and competitive fuels, in gas purchase contracts upon which feasibility of pipeline project depended); *Transwestern Pipeline Co.*, 22 FPC 391, 394-395, modified on rehearing, 22 FPC 542 (minimum bill provisions of proposed tariff required to be modified); *Panhandle Eastern Pipe Line Co.*, 10 FPC 185²⁷ (conditions requiring inclusion of interruptible rate schedules in tariffs). *Trans-Continental Gas Pipe Line Co.*, 7 FPC 24, 38-40 (commencement of service conditioned upon filing of new tariff satisfactory to Commission because of disapproval of certain terms of service); *Alabama-Tennessee Natural Gas Co.*, 7 FPC 257²⁸ (commencement of service conditioned upon filing of tariff satisfactory to Commission). The alternative to imposition of appropriate conditions, i.e., outright denial of a certificate, has also been employed by the Commission to prevent an inferior "end use" of gas and possible future inflation of field prices as a result of sales not in themselves subject to the Commission's regulation. *Federal Power Com-*

²⁷ See *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 232 F. 2d 467 (C.A. 3), certiorari denied, 352 U.S. 891, where a collateral attack on this condition was rejected by the court.

²⁸ Discussed and implemented in *Alabama-Tennessee Natural Gas Co. v. Federal Power Commission*, 203 F. 2d 494 (C.A. 3).

mission v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 23-25.

C. RESPONDENTS' FURTHER OBJECTIONS TO THE RULES ARE WITHOUT SUBSTANCE

We note briefly two additional objections to the Commission's regulations which were advanced by respondents in the proceedings below.

1. Respondents rely upon the fact that the courts, as well as the Commission, have hitherto given effect to increased rates predicated on indefinite escalation clauses of the type now proscribed. The short answer is that the legality *vel non* of a contract provision as a matter of general law does not control the question of the agency's power to prohibit such provisions in the exercise of its regulatory authority. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 416-418; *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 421-423. The only question for a court in passing on prohibitions embraced in the regulation is whether there is a reasonable basis for adopting the measure. In *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, where the approved regulations outlawed trip-leasing practices previously approved, this Court observed (344 U.S. at 314):

* * * The mere fact that a contrary position was taken during the war years when active interchange and leasing were required, that the Commission has never before restricted trip-leasing and has in fact approved it from time to time, does not change our function.

2. Respondents also seek comfort in the fact that the Commission, in its annual reports to Congress from 1956 through 1960, included among its numerous recommendations a request that such clauses be prohibited by statute. The effort to find significance in Congress' failure to legislate overlooks the facts (1) that the requested item was only one of a large package and (2) that it would have outlawed price escalation clauses in existing as well as future contracts, whereas the Commission regulation has prospective application only. As the Ninth Circuit commented in the *Superior* case (322 F. 2d at 618):

The Commission may well have had doubts about its power to strike such clauses from existing contracts, either by general rule or *ad hoc* decision, without having a like doubt about its power to promulgate a general rule outlawing such clauses only for the future. The fact that Congress was unwilling to set aside, by statutory fiat, existing price escalation clauses, has no tendency to establish that the Commission did not already have power to deal with the problem prospectively after administrative consideration of the respective merits of the various kinds of price escalation clauses.

II.

TEXACO'S PETITION FOR REVIEW SHOULD HAVE BEEN DIS-
MISSSED FOR LACK OF VENUE UNDER SECTION 19(b) OF
THE NATURAL GAS ACT

The court below also erred in failing to grant the Commission's timely motion (R. 72) to dismiss Texaco's petition for lack of venue. We recognize that this

Court could decide the questions relating to the Commission's rule-making authority without reaching the issue of venue, since Pan American's petition for review was properly brought in the Tenth Circuit and the decision below applies equally to Pan American and Texaco. However, a decision on the proper interpretation of the venue provisions will tend to limit "forum shopping" and avoid future litigation invited by the amorphous test adopted by the court below.

Section 19(b) of the Natural Gas Act provides that a party aggrieved by a Commission order may seek review in the court of appeals "for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia." Respondent Texaco is incorporated in Delaware (R. 2). Its claim of venue was rested solely on its assertion (R. 2-4) that it is "located" in the Tenth Circuit. There was no allegation that Texaco has its "principal place of business" in that circuit; indeed its certificate application stated that "a principal place of business" was Houston, Texas (R. 27), i.e., in the Fifth Circuit.³⁰

³⁰ Similarly, in a petition for review previously filed in the Fifth Circuit on May 10, 1960 (*Texaco Inc. v. Federal Power Commission*, 290 F. 2d 149) Texaco alleged that venue was properly laid in the Fifth Circuit because it maintained its "principal place of business in relation to its production, gathering, and sales of natural gas at Houston, Texas." See also R. 109. Texaco had also previously sought to invoke the jurisdiction of the District of Columbia Circuit. *Texaco Inc. v. Federal Power Commission*, unreported, C.A.D.C. Nos. 17608, 17652, decided June 24, 1963, certiorari denied, 375 U.S. 941.

With respect to location, Texaco alleged that its Tulsa Division, one of seven divisions in its producing department, is responsible for production in the area including Oklahoma and Kansas; that the Tulsa Division operations include "the negotiations of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of State reports and the disposition of the production;" that the contract here at issue was negotiated by, and is under the supervision of, Tulsa Division personnel; and that the certificate applications involved here were made by that Division (R. 2-3, 109).

The court below concluded that Texaco was located in the Tenth Circuit because it conducted extensive operations in that Circuit and "[m]ore importantly, * * * the gas sold is produced in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit" (R. 112). In our view, these considerations are not decisive. As we read Section 19(b), a natural gas company is "located" only in the State of its incorporation, *i.e.*, its legal residence.

A. In rejecting the Commission's contention that "located" in Section 19(b) relates to a natural gas company's residence, *i.e.*, the State of its incorporation, the Court of Appeals relied principally (R. 110-111) on the fact that the legislative history of Section 313(b) of the Federal Power Act, from which Section 19(b) is derived, shows that "is located" was substituted for "resides," which appeared in an early draft of the bill. There is no indication, however, that this

change, which was incidental to another change of language, was designed to effect a change of meaning.

The first version of what ultimately became Section 313(b) of the Federal Power Act (Part III of the Public Utilities Holding Act of 1935) appeared in Senate Bill No. 1725, introduced in the first session of the Seventy-fourth Congress by Senator Wheeler. This bill provided that "Any person aggrieved by an order issued by the Commission in a proceeding under this Act to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein such person *resides* or has his principal place of business, or in the Court of Appeals of the District of Columbia . . ." (emphasis supplied). A revised bill, known as S. 2796, was referred to the Senate Committee on Interstate Commerce several months later. It contained the venue provisions now in Section 313(b), which modified the language of S. 1725 in two respects: (i) the reference point for venue is the "licensee or public utility" to which the Commission order relates, rather than the "person aggrieved"; and (ii) venue lies in the circuit where the utility "is located" rather than the circuit in which "such person resides." The former change was substantive; the latter, it would appear, merely stylistic." In the Gas Act, "licensee or public utility" became "natural

"We recognize, of course, that in provisions which lay venue on the basis of where a person resides, the term person includes both natural persons and strictly legal entities, such as corporations and, accordingly, that in those situations "resides" refers to corporations.

gas company". In making this language change from the personal to the impersonal, it was only natural to replace "resides" with "is located", since the most common impersonal entity, a corporation, "can have its legal home only at the place it is located by or under authority of its charter * * *." *Ex parte Schollenberger*, 96 U.S. 369, 377.¹¹ Since natural gas companies, public utilities, and licensees include business associations of varied types, both incorporated and unincorporated, it would be difficult, within the limits of felicitous drafting, to find a more precise phrase to denote the residence of a natural gas company than "is located."

B. In concluding that "is located" may relate to places other than a corporation's place of incorporation, the court below cited (R. 111) a dictionary definition to the effect that "[l]ocated" means having physical presence or existence in a place." It went on to say, however, that mere presence or "doing business" will not support venue under Section 19(b),

"Section 102(a)(2) of Delaware's General Corporation Law (Delaware Code Annotated (1953), Title 8, § 102(a)(2)) illustrates this same usage of "located in" for a corporation while "resident" is used for a natural person. That section calls for: "The name of the county and the city, town, or place within the county in which [the corporation's] principal office or place of business is to be located in this State, and the name of its resident agent; *which agent may be either an individual or a corporation.* In towns or cities of over 6,000 inhabitants the street and number of the principal office or place of business shall be stated, and the address by street and number of the resident agent shall be stated. Should the *resident agent not be a resident of, nor located in*, an incorporated town or city, then the hundred of its or his location or residence, and post-office address, shall be stated [emphasis added]."

relying, instead, on the fact that the transactions involved, i.e., the sale and the performance of the contract, were to occur within the Tenth Circuit. Under this test it is apparent that the location of a natural gas company would vary from case to case depending on where the sale occurs.⁴²

Such a concept is not only at odds with the usual meaning of the word "locate" as designating a fixed position,⁴³ but it reads into the Act a test which could easily have been made explicit had it been intended. In this respect, the Gas Act is in marked contrast with numerous regulatory statutes. For example, the Labor-Management Relations Act authorizes the review of Labor Board unfair labor practice order in the circuit "wherein the unfair labor practice in question was alleged to have been engaged in" or in which the alleged offender "resides or transacts business" (29 U.S.C. 160(f)). The same venue lies for enforce-

⁴² The court did not correctly state the "physical presence" test when it declared that a corporation has physical presence or existence in the State of its incorporation. It is common knowledge that many corporations maintain neither officers nor employees, but only a statutory agent, in the State of their incorporation. As the Second Circuit recently observed, the securing of a charter from a State may be a corporation's "sole connection" with that State. *Egan v. American Airlines, Inc.*, 324 F. 2d 565, 566. In such circumstances, while the corporation would be a "resident" of the State and subject to suit there, it could scarcely be said to have physical presence in the State.

⁴³ As the court notes (R. 111), "locate" means "[t]o designate the site or place of [and] * * * [t]o set or establish in a particular spot or position * * *". Webster's New International Dictionary (2d ed. 1958), to which the court referred, also states that locate means "[t]o place oneself; to take up one's residence; to settle; as be located in Ohio."

ment proceedings brought by the Board (29 U.S.C. 160(e)).⁴ It is notable that the venue provision of the Labor Relations Act was adopted on July 5, 1935, and the venue provisions of the Power Act (49 Stat. 860) on August 26, 1935. If, as the court below supposes, Congress intended to permit suits under the Power and Gas Act where the relevant transactions occurred, it obviously knew how to express that thought.

The alternative suggestion made by Texaco that a natural gas company is located wherever it is "doing business" was properly rejected below (R. 111). That construction would render superfluous the provision for venue in the circuit where the company has its *principal* place of business and run counter to the precept "that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent" (*McDonald v. Thompson*, 305 U.S., 263, 266). It is not lightly to be presumed that Congress' insertion of the words "principal place of business" was an exercise in redundancy.

C. It is of course traditional to attach great importance to the place of incorporation for federal venue purposes. Indeed, until the 1948 amendment of Section 1391 of the Judicial Code, 28 U.S.C. 1391 (c), the only "residence" of a corporation for purposes of venue in the federal district court was "the State and district in which it has been incorpo-

⁴ A petitioner for review is also granted the option, denied to the Board, to institute proceedings in the District of Columbia Circuit.

rated * * *. [T]he legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it." *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449-450. See also *Suttle v. Reich Bros. Construction Co.*, 333 U.S. 163. To be sure, statutes of recent vintage have frequently attributed significance to other connections (such as principal place of business or the place where a transaction occurs); but this is invariably by way of addition—not as a substitute for place of incorporation.

We note also that the corporation laws of most States require that every domestic corporation maintain a "principal office," a "principal place of business" and/or a "registered office"; the location is usually specified in the company's articles of incorporation. See, e.g., California General Corporation Law § 301; Delaware Code of 1953, Title 8, §§ 102, 131; District of Columbia Business Corporation Act, §§ 10, 47; Florida Statutes, §§ 608.03, 608.38; Illinois Business Corporation Act, § 157.11; Massachusetts General Laws, chapter 155, § 22; Michigan General Corporation Act, § 79; Missouri Revised Statutes, § 351.370; New Jersey Revised Statutes, §§ 14:2-3, 14:4-2; Pennsylvania Business Corporation Law, § 2851-204.⁴ The statutory "principal office" is the place where process may be served and where transfer and stock books must be kept; it is, in other words, the

⁴ Cf. New Jersey Revised Statutes, § 14:4-1: "The terms 'principal office', 'principal office in this state' and 'registered office', wherever used in this title, shall be construed as synonymous terms."

"locale" or "location" of a corporation for the purpose of suit. In enacting venue provisions, including that in Section 19(b) of the Gas Act, Congress was acting against the background of general corporation laws. It is reasonable to assume therefore that when it referred to the place in which a natural gas company is "located", Congress meant the place—the location—specified in the corporate charter.

There is a large body of precedent supporting this view, as is evident from the numerous decisions involving national banks. In *Raiola v. Los Angeles First Nat. Trust & S. Bank*, 133 Misc. 630, 631, 233 N.Y. Supp. 301, which reviews prior federal and state court decisions, the court concluded (233 N.Y. Supp. at 302):

* * * The location of a national banking association is the place specified in its organization certificate. * * *

In *National City Bank of New York v. Domenech*, 71 F. 2d 13 (C.A. 1), the court of appeals held that, although the National City Bank had a branch in Puerto Rico, it was not "located" there. Similarly, in *Leonardi v. Chase Nat. Bank of City of New York*, 81 F. 2d 19, 22, certiorari denied, 298 U.S. 677, the Second Circuit, citing prior authority, held that a national bank is located only in the place named in its charter and not at each of its branches. And more recently, *Buffum v. Chase Nat. Bank of City of New*

* Black's Law Dictionary (4th ed. 1951) p. 1088, adopts this case as the black-letter definition of "located", saying: "A bank is 'located' in the place specified in its organization certificate. * * *

York, 192 F. 2d 58 (C.A. 7), certiorari denied, 342 U.S. 944, reaffirmed the holding of earlier federal and state courts that a national bank may be sued "only in the place of its establishment, i.e., its location" (p. 60). See, also, *International Refugee Organization v. Bank of America*, 86 F. Supp. 884, 886-887 (S.D.N.Y.); *Schmitt v. Tobin*, 15 F. Supp. 35 (D. Nev.). In *Cope v. Anderson*, 331 U.S. 461, 467, this Court observed that

* * * For jurisdictional purposes, a national bank is a "citizen" of *the state* in which it is established or located * * * and in *that district alone* can it be sued. * * * [Emphasis added.]

And only last term, the Court quoted the foregoing statement with approval and endorsed earlier cases which held or assumed that a national bank is "located" only at the single place specified in its charter and not at other places where it might maintain branches or transact business. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 561-562, footnotes 11 and 13."

"In other contexts as well, the word "located", as applied to corporations, has been equated with "domiciled". See e.g., *Carver v. Spring Perch Co.*, 113 Conn. 636, 155 Atl. 832, 834; *Stanton v. State Tax Commission*, 26 Ohio App. 198, 159 N.E. 340, affirmed, 117 Ohio St. 436, 159 N.E. 823; *San Jacinto Nat. Bank v. Sheppard*, 125 S.W. 2d 715 (Tex. Civ. App.). Indeed, *American Jurisprudence* assumes the equivalence of "residence" and "location" as applied to corporations. 13 Am. Jur., Corporations, § 1158, pp. 1073-1074, headed "Residence or Location of Corporation for Purpose of Venue." Throughout the section, the phrase "location or residence" is used with no suggestion of any differentiation between the two nouns. See, also, 18 Corpus Juris Secundum § 177, p. 586.

CONCLUSION

For the foregoing reasons the judgments of the Court of Appeals should be reversed and remanded, with instructions to conduct further proceedings in *Pan American* and to dismiss, for lack of venue in *Texaco*.

Respectfully submitted.

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APPENDIX

1. The Administrative Procedure Act, Section 4, 60 Stat. 238, 5 U.S.C. 1003, provides as follows:

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written

data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES.**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) **PETITIONS.**—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in

rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint,

at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall

give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

SEC. 5. (a). Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717 d(a)]

SEC. 7 * * *

(c) ^(*)No natural-gas company or person which will be a natural-gas company upon com-

^(*)Subsection 7(c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

pletion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending

the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be

filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938) ; 15 U.S.C. § 717e]

• • • • •
 SEC. 19 • • • • •

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction,

which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new finding, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r]

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3. The rules and regulations of the Federal Power Commission, as amended, 18 C.F.R. (Cum. Supp. 1963), provide in pertinent part as follows:

Section 1.7 * * *

(b) *For issuance, amendment, waiver, or repeal of rules.* A petition for the issuance, amendment, waiver, or repeal of a rule by the Commission shall set forth clearly and concisely petitioner's interest in the subject matter, the specific rule, amendment, waiver, or repeal requested, and cite by appropriate reference the statutory provision or other authority therefor. If a rate filing is accompanied by a request for waiver pursuant to this section the thirty-day notice period provided in section 4(d) of the Natural Gas Act and section 205(d) of the Federal Power Act shall begin to run if and when the Commission grants the request. Such petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, such rule, amendment, waiver, or repeal, and shall conform to the requirements of §§ 1.15 and 1.16. Petitions for the issuance or amendment of a rule shall incorporate the proposed rule or amendment.

Section 154.93 Rate schedule [for independent producers] defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided*, That in contracts executed on or

after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes, levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

* * *

Section 157.14 [relates to pipeline application]
Exhibits.

(a) *To be attached to each application.* * * *
all exhibits specified shall accompany each application when tendered for filing.

* * *

(10) *Exhibit H—Total gas supply data.* A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:

* * *

(v) A conformed copy of each gas purchase contract upon which applicant proposes to rely: * * * *Provided further, however,* That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provision other than those defined as permissible in § 154.93 of this chapter. * * *

Section 157.25 Necessary exhibits.

There shall be filed with the application [of a producer] as a part thereof the following exhibits:

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24 (b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, *Petitioner*,
vs.
TEXACO INC. AND PAN AMERICAN
PETROLEUM CORPORATION, *Respondents*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANSWER OF TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION OBJECTING TO THE
MOTION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF
CALIFORNIA FOR LEAVE TO FILE BRIEF AMICI CURIAE IN
SUPPORT OF PETITIONER

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February, 1964

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Respondents, Texaco Inc. and Pan American Petroleum Corporation, for and as their answer to the Motion of the People of the State of California and the Public Utilities Commission of the State of California (California) for Leave to File Brief Amici Curiae in Support of Petitioner, respectfully show:

1. Respondents would not have refused to consent to the filing of California's amici curiae brief if the factual arguments which constitute the brief had at least an arguable basis in the record before the Court in this case. Respondents object to the filing of California's amici curiae brief because such brief consists entirely of factual arguments that on their face amount to allega-

tions of facts not of record in this case and are, therefore, irrelevant and immaterial to the issues to be decided. Under well settled doctrines, review of administrative orders and court decisions must be upon the record, cf. *Burlington Truck Lines, Inc., et al. v. United States*, et al., 371 U.S. 156, 168-169 (1962), and *Loun v. United States*, 355 U.S. 339, 354 (1957). These doctrines apply to review proceedings initiated under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). cf. *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626 (1945) and *Texas Gas Transmission Corp., et al. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960).

2. On page 2 of its motion, California states that its "direct concern" is "the issue . . . relating to the power of the Federal Power Commission . . . to prohibit, by . . . rule-making . . . , contractual arrangements which it finds incompatible with the public interest." On page 3 of its motion, California urges the Court to "recognize and approve the power of the petitioner to prohibit, through its rule-making authority, contractual provisions which it finds to be inconsistent with the public interest." However, the entire brief annexed to the motion is addressed to the issue of whether certain extra-record facts exist which allegedly show that the contract provisions discussed by California are "incompatible with the public interest." The question of petitioner's "power" is not discussed in the brief.

3. The filing of amicus curiae briefs containing only factual arguments that patently amount to allegations respecting extra-record facts should not be permitted. This Court is not the proper forum for de novo trial of factual issues, and in particular it is not a proper forum for trial of factual issues which require the introduction of evidence not of record before this Court. The arguments now made in the California brief should have been made to the Federal Power Commission and based on a record of evidentiary facts supporting such arguments. California does not cite the existence of an evidentiary record supporting its

arguments, and if such record exists, it is not before the Court in this case.¹

4. Illustrative of the lack of factual support for California's arguments is its argument on pages 6 and 7 in its brief:

"Price can be *definitely* stated and fixed for the full term of a contract. The Commission, in the exercise of its judgment, has recognized this. Moreover, with the initiation of the regulation of producers, the Commission is the overseer of 'just and reasonable' rates and, as an expert body, is qualified to judge the inflationary or deflationary impact the future may have on long-term natural gas contracts."

The Federal Power Commission arguments and the decision in *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137 (1960) contradict this California argument and confirm the non-existence of facts which would support it (see R. 13, 19). Obviously, the record before the Court does not contain any facts which would conceivably serve as a basis for this California argument.

5. Further illustrative of the irrelevance of the California brief are the California arguments which amount to allegations of facts respecting the operation of "favored nation" provisions in producer contracts. The price-changing provisions of the Texaco Inc. contract with Natural Gas Pipeline Company of America (R. 50-52) and the Pan American Petroleum Corporation contract with Colorado Interstate Gas Company (R. 87-88) do not contain a "favored nation" provision, and it is not argued that such contracts could conceivably cause any of the administrative results argued by California. It is evident that the "disturbing fact situation" allegations of California are peculiar to the operation of "favored nation" provisions in that particular situation involving El Paso Natural Gas Company and West Texas Gathering Com-

¹The absence of citations to the certified record as required under Rule 40 (2) of the Rules of this Court is an indication that the facts argued in the California brief are not of record in this case.

pany. California does not argue that facts exist which show that such "favored nation" difficulties are or will be the general pattern in the industry, or that flexible price-changing provisions in respondents' contracts with other purchasers could result in the "disturbing fact situation" argued by California. Not only is the "disturbing fact situation" argued by California not of record in this case, but it does not represent conditions in the industry generally.

6. Each and every one of California's allegations may be explored, decided and resolved upon proper record in proceedings under Sections 7, 4, and 5 of the Natural Gas Act, including "area rate" cases mentioned by California. cf *Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963). Under the rule of *Burlington Truck Lines, Inc., et al. v. United States, et al.*, 371 U.S. 156, 168-169 (1962), and *Lawn v. United States*, 355 U.S. 339, 354 (1957), and the doctrines of judicial review of regulatory orders, the Court may not now resolve disputes over whether facts outside the certified record would support California's arguments. It is, therefore, clear that the Court may not determine whether California's arguments of extra-record facts have support, and the California motion for leave to file brief amici curiae in support of petitioner should be denied.

WHEREFORE, it is respectfully requested that the Motion of the People of the State of California and the Public Utilities Commission of the State of California for Leave to File Brief Amici Curiae in Support of Petitioner be denied.

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February, 1964

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v.

TEXACO INC. AND PAN AMERICAN PETROLEUM
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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**MOTION OF TEXACO INC. FOR ORDER
PERFECTING PROPER VENUE ON REMAND
AND BRIEF IN SUPPORT ON MOTION**

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**MOTION OF TEXACO INC. FOR ORDER
PERFECTING PROPER VENUE ON REMAND**

Texaco Inc. (Texaco), a Respondent in the above styled cause, pursuant to Rule 35 of the Revised Rules of this Court, respectfully moves that this Court, concurrently with issuance of its mandate in this matter and in order to preserve Texaco's ability to obtain consideration of the remaining and as yet unreviewed issues in this cause, Order:

- (1) That insofar as the Respondent Texaco Inc. is concerned, remand of these matters should be directed to the United States Court of Appeals for the Third Circuit, an appellate court found by this Court in its Opinion of April 20, 1964, to be a court properly having venue in the premises; or, alternatively, .

- (2) That upon remand of these matters to the United States Court of Appeals for the Tenth Circuit, that Circuit is to effect the transfer of these matters, insofar as they relate to Texaco Inc. (No. 7217, below), to the Third Circuit for disposition of the remaining and as yet unreviewed questions.

The Court below having decided that the orders of the Federal Power Commission (Commission); brought to it for review, pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), were void for lack of statutory power in that agency (R. 121)¹ did not reach the remaining points for review raised in Texaco's Petition for Review (R. 8-11). Texaco has an urgent and direct interest in obtaining judicial consideration of those matters which are beyond the threshold issue of power to act, which was the issue disposed of by this Court's decision of April 20, 1964. Since this Court also held that venue was not properly with the Tenth Circuit to consider any of these issues, transfer to the circuit where this Court's opinion indicates venue properly lies, is requested.

This Court possesses the inherent authority, recognized in the common law even before the formation of our Nation, to effect such a change of venue under appropriate circumstances. The fundamental importance and significance of this case which prompted this Court to grant certiorari warrant the Court's assistance in the maintenance of the viability of these matters so that complete, fair, and thorough review can be achieved.

¹ References here, and in the attached brief, are to the printed record in this Court.

Pursuant to Rule 35 of the Revised Rules of this Court,
Texaco has attached hereto its Brief in support of this
Motion..

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF OF TEXACO INC. IN SUPPORT OF
MOTION FOR ORDER PERFECTING PROPER
VENUE ON REMAND**

INTRODUCTORY STATEMENT

Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), requires that petitions to review orders of the Federal Power Commission (Commission) be filed "within sixty days after the order of the Commission upon the application for rehearing." The letter order forming the basis of this action was entered November 30, 1962 (R. 70-71).

By the decision and accompanying opinion entered April 20, 1964, in *Federal Power Commission v. Texaco Inc.*, U.S., this Court held that the Court of Appeals for the Tenth Circuit erred in failing to dismiss for lack of

venue the Petition For Review (R. 1-28) filed by Texaco Inc. (Texaco) seeking review of certain orders of the Commission. This Court held that the term "located" as used in the venue provisions of Section 19 (b) of the Natural Gas Act, "in the setting of this Act . . . refers in the case of Texaco to its State of incorporation." (Slip op., p. 5). Texaco is a Delaware Corporation (R. 2), and, as such, is "located" within the Third Circuit.

Thus, it seems that unless this Court issues some order which assures the remand of this proceeding to a court of proper venue, Texaco may be deprived of an opportunity to have the substantial remaining and yet-unreviewed issues which surround these orders judicially considered.

SUMMARY OF ARGUMENT

1. Texaco's further review action is jeopardized by questions of venue—not jurisdiction. *Panhandle, Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635 (1945). The inherent power "thoroughly engrafted upon the common law long before the independence of this country" exists with this Court to effect transfer of these proceedings to assure proper venue. *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911).

2. The importance of a full consideration of the "merits" or "reasonableness" of the Commission's orders in this instance has been laid bare upon this record and has been highlighted most recently by the royalty payment decision of the Fifth Circuit in *Foster v. Atlantic Refining Co.*, F. 2d, No. 20642, March 26, 1964. In such circumstances the powers of this Court should be exercised in a manner which will prevent hardship and injustice and insure that the merits of the cause may be fairly tried. *Eberly v. Moore*, 24 How. 147 (1861).

ARGUMENT

I. This Court possesses the inherent power to effect a transfer for venue purposes.

In *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635 (1945), the Court noted that Congress has vested "all intermediate Federal courts with the power to review orders of the Commission." 324 U.S. at 638. Questions of venue, going to fairness and convenience are quite apart and separate from a lack of jurisdiction, and historically such venue problems can be rectified by transfer to the proper forum. *Cf. Goldlawr v. Heiman*, 369 U.S. 463 (1962); 28 U.S.C. 1406. But the perfection of such a transfer is not limited to those situations where a specific statute exists.

The major treatise writers agree that while there are some statements asserting that venue transfers are only undertaken pursuant to direct statutory authority:

"... according to the weight of authority as well as sound reasoning, common-law courts have inherent power, particularly in criminal cases, to order a change of venue for purposes of securing impartial trials; the power of the English courts to transfer the trial of transitory actions, thoroughly engrafted upon the common law long before the independence of this country, is a part of our common-law heritage, and unless specifically denied by statute the power still inheres in the courts of this country." (notes omitted)

56 Am. Jur., Venue § 42.

The conclusion is similarly stated in other compendia, 27 R.C.L., Venue § 30:

"... The authority to change the venue of civil cases under appropriate circumstances seems also to have

existed at common law, and to have become a part of our judicial system."

See also, 92 C.J.S., Venue § 129. These writers draw heavily on the scholarly research of the Massachusetts high court in *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N.E. 369 (1911), but the highest courts of a number of the states have themselves utilized this power, or enforced its use.¹ The instances, where this inherent authority has not been used have been said to arise only where there are specifically-limited constitutional provisions, or where there exist statutes which cover the entire venue area "in great detail and leave nothing to be governed by the common law." *Crocker v. Justices of Superior Court*, *supra*.

Recently the Fifth Circuit in *Gulf Oil Corp. v. Federal Power Commission*, F. 2d, No. 21151, opinion on petition for rehearing, April 15, 1964, refused to order a transfer in the absence of a specific statutory directive. The Fifth Circuit refused to effect a transfer of this action to a circuit court properly having venue of the matter because (1) there was no statute directly requiring it to do so, (2) no direct decisional authority was cited to support the request, (3) at common law a venue objection went in abatement rather than in bar; (4) in the wealth of reports there should be more decisions holding for transfer than the single one cited to it, and (5) Congress has passed a statute providing for district court transfers. Clearly, not

¹ *Anderson v. Johnson*, 1 Utah 2d 400, 268 P. 2d 427 (1954); *Day v. Day*, 12 Idaho 556, 86 Pac. 531 (1906); *English v. Brigman*, 227 N.C. 260, 41 S.E. 2d 732 (1947); *Cochecho Railroad v. Farrington*, 26 N.H. 428 (1853); *Commonwealth v. Balph*, 111 Pa. 365, 3 Atl. 220, (1886); *Negro Jerry v. Townshend*, 2 Md. 274 (1892); *People v. Peterson*, 93 Mich. 26, 52 N.W. 1039 (1892); *People v. McLaughlin*, 150 N.Y. 365, 44 N.E. 1017 (1896); *State v. Miller*, 15 Minn. 344 (1870); *Barry v. Truax*, 13 N.D. 131, 99 N.W. 769 (1904); *Commonwealth v. Davidson*, 91 Ky. 162, 15 S.W. 53 (1891).

one of these points is a valid basis for this Court failing to transfer in the instant circumstance.

We have above cited the decisional authority supporting this transfer request, which authority all holds that for a constitutional court such as the Court here no express statutory authority is necessary. Furthermore, the very fact that a venue question was not a common law bar to the action supports the requested transfer,² since, as this Court held in *Panhandle Eastern Pipe Line Co. v. Federal Power Commission, supra*, the instant statute is not one where Congress has engrafted a jurisdictional element into a venue provision. Cf. *Schoen v. Mountain Producers Corp.*, 170 F. 2d 707 (3rd Cir. 1948) at 711. While it is recognized that dismissal for improper venue has been ordered on numerous occasions over the years, since the question of transfer was not raised in those cases they are not precedent for denial of the request here. The few cases directly arising on the issue of transfer are all District Court cases, and the matter appears never to have been discussed by the Court of Appeals or by this Court. *Kibler v. Transcontinental & Western Air* (EDNY 1945), 63 F. Supp. 724; *Billings Utility Co. v. Federal Reserve Bank* (D. Mont. 1941), 40 F. Supp. 309; *Lavieties v. Ferro Stamping & Mfg. Co.*, (ED Mich. 1937), 19 F. Supp. 561, aff'd (6th Cir., 1941), 121 F. 2d 455, cert. denied, 315 U.S. 817 (1942).³ Insofar as the

² Of significance here is 28 U.S.C. 2105: "There shall be no reversal in the Supreme Court or a court of appeals for error upon matters in abatement which do not involve jurisdiction."

³ In the *Lavieties* case the court did not use the lack of statutory power as the reason for denying transfer, but rather looked to reasons "based on justice"; in *Billings Utility Co.* the court did note the lack of a specific statute, but indicated that the moving party did not advance any authority to support the motion; in *Kibler* the court did not dismiss, and thus commented on transfer only to say that no specific administrative machinery existed to accomplish such transfer. This latter argument is hardly a grounds to deny substantial justice.

question of specific statutory directives such as 28 U.S.C. 1406(a), which directs transfer by the district courts, are concerned, it is significant that Congress incorporated this codification of the common law transfer power the very first time it undertook a comprehensive review of the Judicial Code after it was reported that the District Courts refused to exercise the transfer powers. Thus, the adoption of the statute cannot be interpreted to derogate the existence of any such inherent authority, and particularly the existence of such power in this court.

Furthermore, the legislative history of Section 1406(a) shows that as initially enacted on June 25, 1948, c. 646, 62 Stat. 937, at the time of the 1948 revision of the Judicial Code, the section required transfer in every case where venue improperly lay. The following year the section was amended to make it clear that the courts might decline transfer where it would not be in the interests of justice to move the case. Thus, the legislative history of 28 U.S.C. 1406(a) indicates that it was passed to guarantee the common law idea of fairness. Congress feared that too much liberality was available, and that parties might intentionally bring actions in the wrong court in order to obtain service upon the defendant. The statute was changed to restrict this practice, and thus "promote justice." 1949 USC Cong. Serv., pp. 1251, 1253. See also Annotation, "Transfer to Proper District," 8 L. ed. 2d 852.

Most assuredly, the statute was not enacted to restrict this court or other courts in their inherent common law powers affecting "all Cases, in Law and Equity." U.S. Const. art. III § 2.

II. This Court should, in the interests of justice, transfer this matter.

Initially it should be recognized that Texaco's Petition

for Review was not filed with the Tenth Circuit to delay, harass or disrupt the Commission.⁴ While the statutory intent of the Natural Gas Act venue provisions had not been passed upon by this Court, Texaco's interpretation was adopted by the full panel below (R. 112); this exact same interpretation had not previously been challenged by the Commission, *United Gas Improvement Co. v. Federal Power Commission*, 290 F. 2d 147, cert. denied *Sun Oil Co. v. United Gas Improvement Co.*, 368 U.S. 823 (1961); and any number of other cases, brought in circuits where the natural gas company affected by the order was neither incorporated nor had its principal place of business had gone unchallenged as to venue (R. 110). While we do not argue "entrapment," we do feel the above background does support and warrant this Court's use of its inherent powers to insure preservation of Texaco's remaining rights in this matter.

All parties have recognized that as to the Commission's challenged orders, the Court below reached only the threshold issue of "power" and the decision below and the matters briefed and argued here did not go to the "reasonableness" of those orders, assuming the power did exist. Petition of the Federal Power Commission for Writ of Certiorari, pp. 2, 10; Brief of Petitioner, Federal Power Commission, pp. 2, 11, 13, 15, 49; Motion of The People of the State of California and the California Public Utilities Commission, pp. 2, 3; Brief of Respondent, Texaco Inc., pp. 2, 10, 61; Brief of Respondent Pan American Petroleum Corp., pp. 2, 3, 14. Having reversed on this threshold point

⁴ With Pan American Petroleum Corp.'s petitions already there, Texaco adopted that brief, the Commission filed but a single brief below, eight cases were argued simultaneously and many actual conveniences were achieved. (R. 72-73). In fact, the case was ripe for transfer to the Tenth Circuit even if filed elsewhere. 28 U.S.C. 2112.

of authority, and remaining points of the Petition for Review not yet having been considered by the lower court, this cause is ripe for remand. *Texas Gas Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).⁵ However, by its Opinion of April 20, 1964, this Court has now held that the Tenth Circuit lacks venue to consider these matters further. Fairness, simple justice, and equity support action by this Court to insure that Texaco can be heard on the remaining issues. Granting the relief sought in the accompanying Motion will produce this result.

In the past the Court has displayed a familiarity with the economic pressures working on those selling a commodity under any long-term contract. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958). The stringency of such problems was recently accentuated when the Fifth Circuit held that a producer operating a lease calling for royalty on the not uncommon basis of "the market price" prevailing for the field could not rely upon the fixed pricing provisions of his long-term gas sales contract as being determinative of that "market price." *Foster v. Atlantic Refining Co.*, F. 2d, No. 20642, March 26, 1964. The court took direct cognizance of the practicalities of the gas industry which require the use of long-term contracts (Slip Op., p. 4). But the way for the producer to do something "to protect itself against increases in price" and concomitant royalty increases, said the court, is the inclusion in the contract "of escalation provisions which would have assured the lessees the prevailing prices during the periods in question . . ." (Slip Op., pp. 5, 6)

⁵In *United States v. Storer Broadcasting Co.* the Court held:

"We reverse the judgment of the Court of Appeals and remand the case to that court so that it may consider respondent's other objections." 351 U.S. at 206.

The lease which Texaco holds on the lands covered by the contract in the instant litigation, a contract which the Commission has rejected because Texaco proposes to renegotiate with the purchaser at intervals during the long contract term (R. 50-52) contains provisions, *inter alia*, for royalty payment on the basis of "market value." Certainly such matters should be carefully considered in determining the reasonableness of the orders proscribing certain clauses. Surely justice and equity dictate that this Court exercise its inherent powers to assist Texaco in achieving the full review contemplated by the Natural Gas Act. *Eberly v. Moore*, 24 How. 147 (1861).

CONCLUSION ³⁸

For the reasons hereinabove set forth, Texaco urges that this Court order the action sought by the accompanying Motion.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 386.

FEDERAL POWER COMMISSION,

Petitioner,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

**BRIEF FOR RESPONDENT
TEXACO INC.**

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TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

**BRIEF FOR RESPONDENT
TEXACO INC.**

OPINION BELOW

The opinion of the Court of Appeals (R. 104-121) is reported at 317 F. 2d 796.

JURISDICTION

The judgment of the Court of Appeals setting aside the Commission's orders and remanding the proceedings was entered on May 20, 1963 (R. 122). The petition for writ of certiorari was filed on August 19, 1963, and granted on November 12, 1963 (R. 123). The jurisdiction of this Court was invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether Federal Power Commission findings and orders going to "the present or future public convenience and necessity", the "unjust, unreasonable, unduly discriminatory or preferential" nature of any "practice or contract", or the prescription of rates or contracts for the future must be made and issued on the basis of an evidentiary record developed upon agency hearing in order to be consistent with constitutional requirements of due process and the provisions of the Natural Gas Act and the Administrative Procedure Act?

2. Whether, on the basis of the facts of record, Texaco was "located" in the Tenth Circuit, consistent with the provisions of Section 19(b) of the Natural Gas Act?

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, and of the Commission's Regulations, as amended, 18 C.F.R. (Cum. Supp. 1963), are set out in the Appendix to Petitioner's Brief, pp. 52-62.¹ Petitioner has also printed Section 4 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1003 because it is considered to be "pertinent" (Pet. Br., pp. 51-52). We consider Sections 2, 5, 7 and 8 of that Act, 5 U.S.C. 1001, 1003, 1005, 1006 to be of equal pertinence, and these sections are set out in Appendix C hereto, *infra*, pp. 79-84. The Commission orders in issue, together with the amendatory language these orders introduced to the regulations, appear in the record as follows: Order No. 232, amending

¹ Hereinafter referred to as "Pet. Br." Attention is also called to the fact that emphasis in quotations herein has been supplied unless otherwise noted.

18 C.F.R. 154.91(a) and 154.93, at R. 12-17; Order No. 232A, amending 18 C.F.R. 154.93, at R. 18-21; Order No. 242, amending 18 C.F.R. 154.93, 157.14, and 157.25, at R. 22-25.

STATEMENT

The portion of the case below now before this Court arose under the Petition of Texaco Inc. (hereinafter referred to as "Texaco") seeking review of orders of the petitioner Federal Power Commission (hereinafter referred to as "Petitioner" or "Commission") summarily rejecting an application for a certificate of public convenience and necessity together with the rate schedule (contract, 18 C.F.R. 154.93) underlying that application which had been submitted for filing. Petitioner conceded, and the Court of Appeals below recognized (R. 119), that Texaco's petition seeking review of the Commission's rejection of the certificate application and contract, without hearing or factual record, encompassed a review by the Tenth Circuit of the lawfulness of those certain underlying general orders of Petitioner which purported to authorize the summary rejection: Order No. 242, 27 Fed. Reg. 1356, 27 FPC 339 (R. 22-25); amending Order No. 232A, 26 Fed. Reg. 2850, 25 FPC 609 (R. 18-21); which had amended Order No. 232, 26 Fed. Reg. 1983, 25 FPC 379 (R. 12-17).

The background situation—While Petitioner's "Statement" includes consideration of certain historical aspects of the regulatory process (Pet. Br. pp. 3-10) additional background, significant to disposition of these matters, has been provided in the Brief filed herein by Pan American Petroleum Corp. (Pan American), also a petitioner below and now a Respondent here. The Court is respectfully directed to that portion of the Pan American "Statement", pp. 4 to 9, for information not repeated here, but complementary to this discussion.

The Texaco sale — Texaco's particular problem with the so-called "forbidden" contract price provisions began on May 1, 1962 when it agreed to sell and Natural Gas Pipeline Company of America, a pipeline company engaged in the interstate transmission of natural gas, agreed to purchase certain quantities of natural gas to be produced by Texaco from properties in which it owned a producing interest and which were located in the Camrick Southeast Field, Beaver County, Oklahoma, (R. 32-62). The contract between Texaco and its purchaser covers the disposition of the natural gas production for a period of twenty years "commencing on the first day of the month following the first delivery of gas" under the contract (R. 56).²

During the negotiation sessions which led to the May 1, 1962 gas sales-purchase agreement, the parties hammered out a contract of some breadth, designed to delineate and enumerate to the extent possible the duties and rights of the respective parties over the protracted sales period and under the variety of circumstances and conditions which could arise, or be expected during such an extended production period. (e.g. R. 34, 35, 36, 42, 43, 45, 49, 50, 53, 55). Specifically, and because of the length of the sales period, the negotiators gave particular attention to the construction and flexibility of the contract pricing provisions since the prices provided or derived thereunder would bind, and

² As a result of the rejection of its certificate application by the Commission and the alleged determination that this contract contained objectionable pricing provisions (R. 63-64), Texaco has not yet, almost two years after execution of its agreement to sell, been able to commence deliveries under this contract. This kind of intense economic hardship imposed upon a producer which seeks court review of regulatory orders of doubtful legality is the result of the holding below which precluded direct review of the underlying regulations (R. 112-114). See *Pan American Petroleum Corp. v. Federal Power Commission*, No. 387, this Term, petition for writ of certiorari pending.

limit,³ the parties through the long years and changing circumstances of the sales commitment (R. 50-52, 53-54).

Thus, in addition to the specifically designated initial delivery price of "seventeen (17) cents" per thousand cubic feet (R. 51), the contract between Texaco and its purchaser-pipeline also provided price changing provisions which would become effective at definite times or upon the happening of definite circumstances in the future, such as the passage of five, ten, or fifteen years after the commencement of initial deliveries (R. 51), or in the event of increased taxation on the "production, severance, gathering, transportation, sale or delivery of gas" disposed of under the contract (R. 53). However, Article X of the sales agreement — the basic price provision — provided yet another means of compensation for and cognizance of the multitude of inter-related uncertainties of the market place and the production process during the twenty-year sales commitment period. Thus, renegotiation is to be undertaken six months prior to the beginning of the third (1974) and fourth (1979) of the four five-year periods into which the contract term has been divided.⁴ The price, if renegotiated, will have relation to prices then being paid by interstate pipeline purchasers other than Texaco's purchaser here, but for purchases of natural gas they are then making in the generally contiguous production area (Beaver and Texas Coun-

³ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332; *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137.

⁴ As noted in footnote 2, *supra*, the time periods in the contract are related to the date of initial sales, still delayed by the action being reviewed here. As a result, the period for which renegotiations are contemplated may be more than ten or fifteen years in the future, and the periods to which these renegotiated prices will apply, more than fourteen or nineteen years distant.

ties, Oklahoma) (R. 51). To insure equitability in renegotiation, it is specifically required that appropriate adjustments are to be made to any prices used for comparison purposes in order to insure comparability and recognition of the "facts existing" as to the instant sale at the time the negotiations commence (R. 51-52).

Petitioner's actions — Under cover of August 27, 1962, and as required by Section 4(c) of the Natural Gas Act, and Petitioner's procedural regulations, Texaco filed the May 1, 1962 contract with the Commission as its rate schedule for sales from the specified Camrick Southeast acreage (R. 30-31). Pursuant to Section 7 of the Act, and other applicable regulations, Texaco also filed its application for a certificate of public convenience and necessity (R. 26-29). Included in this application was Texaco's sworn plea for immediate, temporary relief pursuant to the Commission's Regulation on Temporary Authorizations, 18 C.F.R. 157.28, and Texaco's notice that sales by other producers on offsetting properties were causing migration of gas and drainage from Texaco's leases (R. 28).⁵

Texaco was not afforded the relief of temporary authorization for the sale, which would have permitted it to stop gas migration by the initiation of its own production; instead, by order of October 5, 1962 (R. 63-64), Petitioner summarily rejected both Texaco's rate schedule filing and its certificate application. Petitioner "rejected" the submittals because "review of the contract discloses that it

⁵ Petitioner's public files show that there are some 31 other producers in the Camrick Southeast Field selling natural gas production in interstate commerce for resale under some 72 contracts, accepted for filing by the Commission as rate schedules, which contain renegotiation clauses similar to the "objectionable" clause contained in Texaco's May 1, 1962, summarily-rejected contract.

contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's Regulations." (R. 62).

The provisions of Section 154.93 referred to in the rejection order are the product of Petitioner's Order Nos. 232 and 232A. It was Order No. 232, issued March 3, 1961, which declared several types of common natural-gas-contract price clauses to be "inoperative and of no effect at law" in contracts tendered for filing with the Commission after April 2, 1961 (R. 12-17). On March 31, 1961, the Commission amended this Order by issuance of Order No. 232A, which did little in actuality to modify the harsh action of the earlier order.⁶ (R. 18-21). Then, on February 8, 1962, Petitioner issued Order No. 242. This directive provided for the outright rejection of contracts, together with their related certificate applications, if "price changing provisions other than the permissible provisions" are included (R. 22-25).

The rejection order of October 5, 1962 was bottomed on the purported authority of these regulations.

Following the procedures provided by Section 19(a) of the Natural Gas Act, Texaco duly filed an application for rehearing of the October 5 rejection (R. 65-69). By order of November 30, 1962, the Commission denied both relief and rehearing (R. 70-71).

⁶ The so-called price-redetermination permitted as a result of the modification deprives the producer of the increased rates until after Commission decision on the rates as filed by some other producer; thus depriving him of an access to the Commission, through Section 4(e), at a time when his economic needs may well call for an increase, and this in turn will preclude collection of the rate until after passage of the period, the facts and conditions of which, will prove the need for the increase.

7

A petition for review was filed with the Court of Appeals for the Tenth Circuit within sixty days after the order of November 30, 1962, as required by Section 19(b) of the Act (R. 1-11).

The decision of the Court of Appeals — The May 20, 1963 Opinion of the court below (R. 104-121) actually ruled upon seven pending cases which had been argued together; only two of those matters are now before this Court in the instant proceeding:

1. Prior to the issuance of Order No. 242, the Commission had implemented its Order Nos. 232 and 232A by accepting all rate schedules for filing with the conditional notation that if "objectionable clauses" were included in the agreements, they were "inoperative and of no effect at law" (R. 107). Cases 6947, 6973 and 7135 attacked these efforts, but the decision below accepted the Commission's argument that there was no present aggrievement in these instances (R. 114-116).

2. When Order No. 242 subsequently issued, Case Nos. 7002 and 7179 were filed to obtain review of the rule-making proceeding itself. Here again, the Commission urged dismissal on the ground "that the Act vests no jurisdiction in the court of appeals to review orders of the Commission amending its general rules and regulations" (R. 112). Although it recognized that such review "would aid in the administration of the Act" (R. 113), the Court did dismiss the actions, but on its stated grounds that the orders complained of do not themselves presently adversely affect the parties (R. 115).

3. Case Nos. 7217 and 7303 relate to those portions of the combined matters heard below which were decided by the lower court to be present reviewable matters aggrieving the parties. It is these causes which sought review of

Petitioner's implementation of Order No. 242 by the rejection out of hand of the Texaco and Pan American rate schedules and certificate applications.

The Commission did seek dismissal of No. 7217 below on the grounds that venue was not properly in the Tenth Circuit since, in Petitioner's view, Texaco was not "located" within that Circuit under Petitioner's interpretation of Section 19(b) of the Natural Gas Act. The Court held that "the question of whether Texaco is located in the Tenth Circuit must be determined on the particular facts" and found that on the basis of the undenied allegations "Texaco is located in [this] circuit for the purpose of the venue provisions of § 19(b)" (R. 113).

As noted above, Petitioner sought to dismiss, on one ground or another, six of the seven cases before the reviewing circuit court. While such dismissal was permitted as to some of the actions because of lack of present aggrievement, the Court did note that general Order Nos. 232 and 232A:

"... do not, and cannot, invalidate either retroactively or prospectively price-changing clauses in a gas-sales contract between a producer and a pipeline and are no justification for the rejection, without hearing, of a rate or charge based on such clauses." (R. 121).

But the Court of Appeals was careful to limit this effort of the Commission to avoid review of Commission rulings. Aware that the Commission has successfully resisted efforts to achieve judicial review of the "record" or the "evidence" upon which the Commission purported to base the findings of its general orders, the Court of Appeals sought record support for the rejection of Texaco's filings. However, all the record contained were copies of the never-reviewed general orders with their never-reviewed conclusions. Thus, the Tenth Circuit held:

"... The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question—the propriety of indefinite price-changing clauses.

"Neither sympathy for the administrative difficulties of the Commission nor recognition of its expertise in the regulation of those subject to the Natural Gas Act justifies disregard of the statutes under which the Commission operates. We find no statutory authorization for the Commission actions here attacked." (R. 117).

The court then held that the authority to issue rules and regulations is "not a source of power to regulate in conflict with substantive provisions of the Act," (R. 117), and asserted that the provisions of the contract of any regulated entity could not be modified nor a certificate denied unless proper findings, supported by an evidentiary record, subject to court review, supported that action.

"... In the cases at bar the Commission has held no adversary hearings at which facts have been adduced to sustain findings which, on the basis of statutory standards, support the decisions reached. No amount of administrative expertise can supply these deficiencies." (R. 119)

SUMMARY OF ARGUMENT

The Petitioner has assumed the very issue in question. Petitioner did not properly follow the rulemaking procedures of the Administrative Procedure Act, Section 4(b), when, without proper hearing, record, findings, or possi-

bility of court review it "forbid" use of certain contract forms and prescribed the rate language and contracts which must be utilized by independent producers in their interstate sales. The Natural Gas Act, the statute from which the Commission derives its delineated powers, specifically requires that the proscription of any rate, contract, or practice, and the prescription of other rates, contracts or charges may be made only after a full hearing; therefore, the Administrative Procedure Act specifically forbids the course of action followed by the Commission. The legislative history and contemporaneous actions of those associated with passage of the pertinent acts confirm the clear relationship between these statutes, and the need for formal action before the Commission may act as it did here.

Sections 4, 5 and 7 of the Natural Gas Act demand a full hearing before issuance of any order purporting to determine either "present or future public convenience and necessity" or "just and reasonable" rates or contracts. No Commission action under Section 16, a general housekeeping and ordering authority, is appropriate to the Natural Gas Act if it frustrates and circumvents the Congressional requirement of a hearing coupled with the possibility of full judicial review as provided by other specific directives of that Act. Expertise and discretion cannot be substituted for the findings and analysis necessarily antecedent to valid agency substantive actions. *Burlington Truck Lines v. United States*, 371 U.S. 156.

The Commission's orders which outlawed the future use of previously acceptable flexible contract price clauses purported to make findings establishing the reasonableness of that action, but no record was ever available from which the reviewing court could do more than accept the self-styled "reasonableness" of that agency action. However,

public knowledge and the Commission's own past practices themselves refute its alleged "findings." It has been held to be the Congressional purpose that natural gas companies regulated by the Commission not be precluded by law from flexibility in the pricing of the commodity they sell, *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 113. There can be no presumption that the Commission's attempt to frustrate this Congressional intent is "reasonable," particularly when the Commission is yet only on the threshold of what it hopes will be a workable method for ascertaining just and reasonable rates for producers. *Wisconsin v. Federal Power Commission*, 373 U.S. 294. The denial to independent producers of contractual access to the Commission, so that an opportunity is available for the producer to justify his prices, is an abuse of statutory power. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332.

Section 19(b) of the Natural Gas Act, *inter alia*, permits venue for judicial review purpose in "any circuit" where the affected natural-gas company "is located." This provision, enacted for the convenience of petitioners, and not the agency, *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, is a specific Congressional change from earlier drafted language providing more limited venue privileges, and as such, displays a clear intent to avoid confinement to the more narrow, and rejected term "resides." Since venue is not limited to "a" or to "the" circuit, determination of location in "any" one circuit as opposed to "any" other becomes a question of fact in the particular instance. *Colorado Interstate Gas Co. v. Federal Power Commission*, 142 F. 2d 943, affirmed, 324 U.S. 581. The undisputed facts support the finding that venue lay with the Tenth Circuit.

ARGUMENT

The decision of the Court below does not relegate the Federal Power Commission to "case-by-case" regulation of independent producers; and in issuing its Order Nos. 232, 232A and 242 — the orders emanating from the purported "rulemaking" — Petitioner did *not* comply with the provisions of the Administrative Procedure Act.⁷ These points are vital because erroneous assumptions as to each permeate the entire argument advanced by Petitioner.

That portion of Petitioner's Brief (pp. 19-39) which discusses the decision below and asserts its inconsistency with Petitioner's statutory grant of powers under the Gas Act and its non-compatibility with other decisions of this Court suffers from the fatal deficiency of assuming, without establishing, these premises. As will be shown, false foundations have necessarily led Petitioner to false conclusions.

I.

THE COMMISSION DID NOT FOLLOW THE RULE- MAKING REQUIREMENTS OF THE ADMINIS- TRATIVE PROCEDURE ACT.

Petitioner asserts here and uses as a premise for later argument, the claim that in issuing the questioned orders it followed the requirements of the Administrative Procedure Act — to which it is admittedly subject. (Pet. Br. p. 27, p. 29, note 31). See also, *State Corporation Commission of Kansas v. Federal Power Commission*, 206 F. 2d 690, 723, cert. denied, 346 U.S. 922. Such is decidedly and demonstrably not the case.

⁷ Sections 4, 5 and 7 of the Natural Gas Act, 15 U.S.C. 717c, 717d, and 717f, and Sections 4, 5, 7 and 8 of the Administrative Procedure Act, 5 U.S.C. 1003, 1004, 1006 and 1007 must be referred to herein with regularity. To aid in clarity, yet reduce verbiage, the former statute is sometimes herein referred to as "Gas Act" and the latter as "APA."

Section 4(b) of the Administrative Procedure Act does prescribe formal and informal procedures for "rulemaking" as defined in that Act. Section 2 of the APA sets forth the following definition:

"(c) Rule and Rulemaking — 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the *approval or prescription for the future of rates . . . prices . . . services or allowances therefor . . . or practices bearing upon any of the foregoing.* 'Rule-making' means agency process for the formulation, amendment, or repeal of a rule."

Two other definitions set out in Section 2 of the APA are pertinent and bear upon the failure of the Petitioner to follow the proper statutory course in the promulgation of the orders negated or modified below:

"(d) Order or adjudication — 'Order' means . . . final disposition . . . in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order."

"(e) License and licensing — 'License' includes . . . any agency permit, certificate, approval . . . or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

These matters are quoted in some detail because of their key role in refutation of the Commission's erroneous assumption that it has followed the rulemaking provisions of the APA in issuing the complained of orders.

Section 4(b) of the Administrative Procedure Act specifically provides that "[w]here rules are required by statute to be made on the record after opportunity for an agency hearing" the otherwise acceptable procedures of limiting

agency consideration to written views or arguments must give way to the strict hearing and decision processes established in other sections of the APA — steps which this record shows were definitely not followed in the instant proceeding (R. 12-25; 118). Initially, then, it must be decided whether some statute requires that “rules” going to the subject matter of the rules promulgated in Order Nos. 232, 232A and 242 be made on the record and after hearing. Quite clearly, the Natural Gas Act does so require.

A. Section 5 of the Natural Gas Act restricts the determination of rates or contracts to be thereafter observed to cases where unreasonableness is found “after a hearing.”

As quoted above, the APA includes within its definition of a “rule” any agency statement going to future rate or price practices. “Rule making” is the process of promulgating such a directive. It must be conceded that what the Commission did by its Order Nos. 232, 232A and 242 was issue a “statement of general . . . applicability and future effect” which went to the “practices bearing upon” producer rates and prices for natural gas sales. (R. 12-25). The Commission directed the elimination of certain practices (the use of so-called indefinite pricing clauses) and prescribed specifically what rate and price practice must be for the future. (R. 20-21).

The definition of “rule” and “rulemaking” appearing in the APA received direct Congressional attention. Senate Documents, Volume 8, No. 248, “Administrative Procedure Act — Legislative History,” 79th Cong., 2d Sess., 1946, pp. 14, 115, 191, 193, 197, 225. Of particular signi-

* All of the Committee Reports and floor discussion leading to passage of the Administrative Procedure Act have been compiled and printed in this single document hereinafter referred to as “Legislative History.”

ficance is the statement of the Attorney General set forth in his October 19, 1945 letter, commenting on the final draft of S. 7, which became the APA. The letter, addressed to the Honorable Pat McCarran, Chairman of the Senate Judiciary Committee, was ordered printed as part of the legislative history:

"In Section 2(c) the phrase 'the approval or prescription for the future of rates, . . . prices, . . . ' etc. is not, of course, intended to be exhaustive. . . . Specification of these particular subjects is deemed desirable, however, because there is no unanimity of recognition that they are, in fact, rulemaking . . ."

Legislative History, p. 225.

But Section 4(b) of the APA does not permit *all* rules to be issued after the mere "submission of written data, views, or arguments" as provided in the first sentence of that subsection. The next sentence demands that formal hearings be held if some other statute requires that the particular subject matter of the rule be issued only after hearing. Since Section 5(a) of the Gas Act does so require, Petitioner did not comply with Section 4(b) of the APA because it failed to undertake such a hearing. It is that elemental.

—There can be no doubt that it is Section 5(a) of the Gas Act which delineates Petitioner's authority as to rates and contracts with future effectiveness. That Section says, *inter alia*:

"Whenever the Commission, after a hearing . . . shall find that any rate . . . charged . . . or that any . . . practice, or contract affecting such rate . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate . . . practice, or contract to be thereafter observed and in force . . ."

This Court and other courts have uniformly interpreted the "hearing" required by this Section to demand far more than the "submission of written data." *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U.S. 575; *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591; *Federal Power Commission v. Sierra Pacific Power Co.* 350 U.S. 348. As interpreted, these hearings comport with the later-enacted hearing requirements of Sections 7 and 8 of the APA. See, e.g., *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. at 583-584. The Court below refused to permit the Commission to substitute some lesser procedure for this Congressionally-required hearing. (R. 117, 120). Since Section 5 of the Gas Act required a hearing, Section 4(b) of the APA required the same type of hearing.

Should any doubt remain that the Commission did not properly follow the requirements of Section 4(b) of the APA when it promulgated rates and contracts to be observed after April 2, 1962 (R. 25) without benefit of evidentiary hearing, record, or findings based upon that evidence it must be dispelled by the contemporaneous statements of those who were participants in the formation and passage of that Section of the APA.

As noted, the Attorney General and his office played an important role in reporting on administrative activity prior to passage of the Administrative Procedure Act in 1946 and in commenting and consulting with Congressional leaders on the draft of S. 7, 79th Cong., 1st Sess., which became this Act. Shortly after passage of the Act, the Department of Justice published the "Attorney General's Manual on the Administrative Procedure Act." The manual was designed to be "a general analysis of the provisions of the Act" and it was "intended primarily as a guide to the agencies in adjusting their procedures to the require-

ments of the Act", page 6. Thus, each Section and Subsection of the newly-enacted APA was discussed seriatim. Under the discussion of Section 4(b) of the APA, and particularly the exceptions where "formal rule making" would be required, it was the considered opinion of the Department of Justice that the Natural Gas Act was one of those few statutes which required hearings prior to the issuance of rules of general applicability:

"... where rates or prices are established by an agency after a hearing required by statute, . . . the agency's action must be based upon the evidence adduced at the hearing. Sometimes the requirement of decision on the record is readily inferred from other statutory provisions defining judicial review. For example, rate orders issued by the Federal Power Commission pursuant to the Natural Gas Act (15 U.S.C. 717) may be made only after hearing; upon review in a circuit court of appeals or the Court of Appeals for the District of Columbia, the Commission certifies and files with the court 'a transcript of the record upon which the order complained of was entered,' and the Commission's findings of fact 'if supported by substantial evidence, shall be conclusive.' It seems clear that these provisions of the Natural Gas Act must be construed as requiring the Commission to determine rates 'on the record after opportunity for an agency hearing.' See H.R. Rep. p. 51, fn. 9 (Sen. Doc. p. 285)"

Attorney General's Manual, page 33.

• • •

"With respect to the types of rulemaking discussed above, the statutes [discussed, including the Natural Gas Act] not only specifically require the agencies to hold hearings but also, specifically, or by clear implication, or by established administrative and judicial construction, require such rules to be formulated upon the basis of the evidentiary record made in the hearing. In these situations, the public rule making procedures

required by Section 4(b) will consist of a hearing conducted in accordance with sections 7 and 8."

Attorney General's Manual, page 34.

Thus, it was clearly understood at the time of the passage of the APA, by those who had studied and worked with the various bills and had consulted and advised with the legislators who drafted and passed the bill, that the promulgation of rates or contracts or practices for the future, matters requiring a hearing under Section 5(a) of the Gas Act, were matters which came within the formal rulemaking reservation of Section 4(b) of the APA and which required the hearing, the evidence and the other protections of Sections 7 and 8 of the APA. As noted earlier, the Commission in its brief filed here and in the Orders complained of cited and relied upon its authority under Section 5(a) of the Gas Act. The decision below merely prohibits the Commission from circumventing the clear language of the two statutes in question and requires that a hearing be held and an evidentiary record formulated before agency promulgation of rates, contracts or practices "to be thereafter observed and enforced."

B. Section 4 of the Gas Act, itself requiring hearings, does not provide escape from the formal requirements of Section 4(b) of the APA.

On its face, Section 4(e) of the Natural Gas Act deals specifically and directly with increased rates and the testing of a "new schedule" for an existing sale or service. The power granted here also goes to the testing of past rates, because of the refund provisions of this Section. Ruling upon the lawfulness of rates charged in the past is, of course, adjudication under the Administrative Procedure Act, and not rulemaking. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 284 U.S. 373;

Legislative History, p. 225. Thus, any action by Petitioner, insofar as it affected past rates, would, as adjudication, be specifically subject to the provisions of Section 5 of the APA and, pursuant thereto, Sections 7 and 8. The Commission has never alleged that it has complied with these provisions, although it did refer to Section 4 of the Gas Act in Order Nos. 232, 232A and 242.

In its argument here, Petitioner interprets its Section 4 Gas Act powers as also permitting the prescription of future rates by the incorporation of its Section 5(a) Gas Act powers. (Pet. Br. p. 32). Even if accepted, this interpretation could not excuse the failure to comply with Section 4(b) of the APA.

This Court analyzed the Commission's rate review and rate setting powers, and the limitation on those powers, in its decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103. In the *Mobile* decision, there was specific occasion to discuss both Sections 4 and 5 of the Act:

"... These sections [Sections 4(d) and (e) and 5(a)] are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor define the initial rate-setting powers of natural gas companies." 350 U.S. at 341.

Most assuredly, with Sections 4 and 5 being parts of a "single statutory scheme" the Commission cannot in some way negate the specific hearing requirements of Section

5(a) of the Gas Act by exercising the powers in that Section indirectly through some other Section of that Act. Further, Section 4 itself requires that Petitioner "enter upon a hearing", and not until "after full hearing" may it take action as to the rate, charge, classification or service reviewed.⁹ Certainly no authority can be conjured from these express hearing requirements which permits avoidance of the hearing requirements of the last sentence of Section 4(b) of the APA. Even if some sort of "rule-making authority" as opposed to "adjudication" powers flows from Section 4(e) of the Gas Act, the specific "hearing" requirements of this statute cannot be ignored when applying the provisions of the APA.

C. Section 7 of the Natural Gas Act similarly requires hearing before action and does not provide authority for the use of abbreviated rulemaking procedures which fix rates or contracts.

Just as it has been shown above that Petitioner cited Sections 4 and 5 of the Gas Act in support of its actions in issuing the orders complained of here, so did Petitioner reply upon Section 7 of that Act. This Section of the Natural Gas Act deals with the certification or licensing powers of the Commission, insofar as its authority over natural gas matters is concerned.

We have set forth the definitions of adjudication and licensing as they are specifically spelled out in Section 2 of the Administrative Procedure Act, *supra*, page 14. As

⁹ Although Section 5(a) of the Gas Act does give some authority to review a "practice, or contract" affecting a rate, no mention of "contracts" appears in Section 4(e) of the Gas Act. Further, in each of the cases cited to support its interpretation of its powers for the future under Section 4 of the Gas Act, (Pet. Br. p. 38, note 34) full hearings were permitted. *Mississippi River Fuel Corp. v. Federal Power Commission*, 252 F. 2d 619 at 621, see 14 FPC 353; *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 236 F. 2d 60 at 62, see 3 FPC 273.

therein defined, adjudication is the process of formulating an order in anything other than a rulemaking matter. Thus, by definition, the issuance of a license or certificate or the "modification or conditioning," of a certificate is an adjudicatory matter. As such, the Administrative Procedure Act, Section 5, specifically requires that strict adjudication procedures be utilized, including the requirements of Sections 7 and 8 of the APA. There is no basis whatsoever for the use of "rulemaking" procedures — formal or informal. Therefore, the discussion of the Commission's prior actions in certificate matters arising under Section 7 of the Gas Act (Pet. Br. pp. 33-38) is no authority for the action taken by the Commission in the issuance of its Order Nos. 232, 232A and 242. In fact, since, in every instance, the actions taken as to the certificate matters cited were not undertaken until after full hearing, these past actions of Petitioner themselves condemn the course followed in Order Nos. 232, 232A and 242.¹⁰

By definition, Section 7 of the Gas Act goes to matters requiring compliance with the adjudicatory provisions of Sections 5, 7 and 8 of the APA. If Petitioner asserts its regulations are the promulgation of "conditions" upon certification of new transactions (Pet. Br. p. 33) rulemaking, as defined in the APA, cannot be applicable. In any event, whether rulemaking or adjudication, the Ad-

¹⁰ Of equal significance is the fact that in several of the cited proceedings, Commission conditioning or certification actions were reversed because they were found by the reviewing courts to be without evidentiary support. *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378; *United Gas Improvement Co. v. Federal Power Commission*, 283 F. 2d 817, cert denied, *sub. nom. Superior Oil Co. v. United Gas Improvement Co.* 365 U.S. 879; and *cf. Sohio Petroleum Co. v. Federal Power Commission*, 298 F. 2d 465; *The Pure Oil v. Federal Power Commission*, 292 F. 2d 350.

ministrative Procedure Act has been flaunted by the procedures followed in promulgation of the questioned regulations.

- D. Section 16 of the Natural Gas Act cannot be used to avoid the requirements of other sections of that Act or to frustrate the purposes of the Administrative Procedure Act.**

In the foreword to the official Legislative History of the APA, Senator McCarran has written:

"The Administrative Procedure Act is a strongly marked, long-sought and widely heralded advance in democratic government . . . Although it is brief, it is a comprehensive chapter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those upon whom the law may impinge . . ." p. III.

This Court has similarly interpreted that Act, saying in *United States v. Morton Salt Co.*, 338 U.S. 632:

"The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights." 338 U.S. at 644.

This Court has said of the Natural Gas Act that the purpose of Congress was to create a comprehensive and effective regulatory scheme, *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, and that the various sections should be given only the scope

necessary for preservation of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and then subject to hearing and review and possible modification by the Commission, *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378; *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, and that this comprehensive scheme also must protect the legitimate interests of natural gas companies which Congress intended to include in the category of the public interest. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103.

This Court has also held that the powers conferred under Section 16 of the Gas Act "to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions" which are spelled out in the other Sections of the Act, *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508, and that Section 16 "appropriate orders" as to rates contemplate prior completion of the precedent hearings and findings required elsewhere in the Gas Act, *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585. Thus, the clear and explicit statutory right to a hearing — and the concomitant duty to provide that hearing — on matters of certificates (Section 7), past rates and contracts (Section 4) and future rates and contracts (Section 5) cannot be rescinded by the power to do what is "appropriate" to carry out the provisions of these Sections (Section 16). In *Miller v. United States*, 294 U.S. 435, this Court said of statutory provisions such as Section 16:

"... The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the provisions of the act — not to amend it." 294 U.S. at 440.

The Court of Appeals for the District of Columbia Circuit has phrased the obvious limitation the rest of the Act places on the powers to be exercised under Section 16 in this manner:

"... But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the *Mobile* opinion, 'The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.' An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation, which Willmut suggests, would deny to United the right to change rates at which it offers service, which the *Mobile* decision says is the right of a natural gas company. Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission." [Footnote omitted] *Willmut Gas & Oil Co. v. Federal Power Commission*, 294 F. 2d 245 (1961) at 250, cert denied; 368 U.S. 975, rehearing denied, 369 U.S. 813.

The Court below said of the Commission's action in relation to Texaco:

"Section 16 of the Act empowers the Commission to make rules and regulations to carry out the provisions of the Act but that section is not a source of power to regulate in conflict with substantial provisions of the Act." (Notes omitted) (R. 117).

So finding, the Tenth Circuit noted that the "Commission asserts that the necessary authority flows from §§ 4,

5 and 7": (E. 117), and proceeded, as we have done here, to show that these sections require a hearing with the development of an evidentiary record¹¹ before Commission orders affecting practices covered by these Sections may issue. Because the statute so provides, informal rulemaking practices are not permissible, and the formal practices of Section 4(b) or the adjudicatory steps of Section 5 of the APA are the only lawful vehicles for Commission action.

Section 16 cannot be used as a vehicle to overcome the specific provisions of other sections of the Act or to legislate additional power. The only source of such additional power, if Petitioner feels such authority is needed, is Congress itself. The Court below reminded the Commission of this (R. 120) by reference to this Court's decision in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607:

"... not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive ... For the ultimate question is what has Congress commanded. ..." 322 U.S. at 617-168 (R. 120).

The clear command of Congress in both the Natural Gas Act and the Administrative Procedure Act has been de-

¹¹ In *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177 this Court commented on the statutory provision for a hearing in the following manner at page 182:

"... The language of the provision points to definitive action. The Commission is to 'determine.' The Commission must determine 'after hearing.' The requirement of a 'hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is 'the hearing of evidence and argument.' *Morgan v. United States*, 298 U.S. 468, 480" (emphasis in original.)

tailed above. That clear command requires rejection of the arbitrary and summary course followed by Petitioner in the issuance of Order Nos. 232, 232A and 242. We do not concede that experience has shown the need for a more comprehensive coverage or for added powers for the Commission. The alleged difficulties interjected here as "background" (Pet. Br. pp. 15-19) and discussed in the orders below (R. 13, 22-24) are completely without record support and are not properly before this Court. Should "background" of this nature be deemed of some assistance, we have discussed each of Petitioner's background assumptions in Appendix A, *infra*, pp. 61 to 75, wherein we show that each is completely contradicted by fact, logic, or prior court or Commission action. Even if we were to assume the validity of some of these without-evidence "findings," the Third Circuit had reason to clarify the law for the Commission on another occasion when the Commission sought to reject natural gas company filings out of hand:

"We can understand, as the argument in this case has seemed to imply, that the Commission may have had to contemplate serious injury to the public interest because of its inability with very limited funds and staff to perform the enormous task of investigation and analysis imposed upon it in times when so many public utilities are submitting important proposals within its jurisdiction and the statutory scheme requires it to act promptly or let proposals go by default. But the remedy lies with Congress. If changes in the law are needed . . . it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them . . ."

Mississippi River Fuel Corp. v. Federal Power Commission, 202 F. 2d 899 at 902-903.

As demonstrated in the following section of this brief, the Commission's Section 16 authority to consolidate matters for hearing and the development of a single evidentiary record goes far toward alleviating the alleged difficulties to which the Commission has pointed.

II.

THE COMMISSION IS NOT LIMITED TO THE ALTERNATIVES OF CASE-BY-CASE DETERMINATION OR NON-HEARING, NON-REVIEWABLE RULEMAKING.

The Commission's analysis of the holding of the Tenth Circuit rests upon its contention — and its subsequent arguments against the position — that the lower Court's decision reduces Petitioner to "case-by-case adjudication" and precludes "resort to rulemaking" (Pet. Br., p. 19). Such is not the case, and this straw man of a case-by-case limitation on its powers, together with the atmosphere of confusion, frustration and implied damage to the public interest which Petitioner weaves around this approach should be unmasked at the outset. On this point, the holding below is directed toward the proposition that findings and orders of the Commission, which Congress specifically has made subject to review, modification or rejection by the courts, Section 19(b) of the Natural Gas Act, will not be sustained if unsupported by record evidence (R. 117). It nowhere asserts that the factual record *must be* compiled in "case-by-case adjudication."

That conclusion is purely the Commission's (R. 119).

If the statutory hearings required by Sections 4, 5 and 7 of the Gas Act and Sections 4, 5, 7 and 8 of the APA, can be provided, and the proper type of record and findings advanced on some basis other than a proceeding as

to each individually docketed filing (case) for each individual regulated natural gas company neither any argument of Texaco, nor any holding of the Tenth Circuit would restrict such procedure. If the procedure followed were lawful on other grounds, no one — to our knowledge — has asserted it would be unlawful if not “case-by-case.” In its order of December 23, 1960, inaugurating *Area Rate Proceeding*, (Permian Basin) Docket No. AR61-1, 24 F.P.C. 1121, the Commission said:

“... In order that there may be assured the development of evidentiary records containing all significant facts relevant to the determination of an appropriate price level or levels ... it is necessary and appropriate to initiate and conduct area rate hearings.” 24 F.P.C. at 1122.

The order then noted that the proceeding would cover “proposed increases in rates and charges,” “rates ... not under suspension” and “the question of ... appropriate initial rates.” 24 F.P.C. at 1122. The ordering provisions are preceded by recognition that these matters were initiated pursuant to the “Natural Gas Act, particularly Sections 4, 5, 7, 14, 15 and 16 thereof.” 24 F.P.C. at 1123.

As the record here indicates, the Court below only insisted on the development of an evidentiary record required by the statute (R. 117) when the Commission purports to act pursuant to Sections 4, 5 or 7 of the Natural Gas Act (R. 117-118; cf. R. 13, R. 24 and Pet. Br. pp. 31-38). The Commission's own action in initiating the first area rate proceeding indicates its belief that it can proceed under these same statutory authorities on something substantially

more broad than case-by-case adjudication.¹² Furthermore, the decision below specifically noted that the "problems of area pricing are not presented here" (R. 121). Certainly, Petitioner's actions since the decision below in initiating a number of consolidated proceedings for hearing pursuant to Sections 4, 5 and 7 of the Gas Act contradict the "case-by-case" shibboleth it now advances: *Sunray DX Oil Co., et al.*, Docket Nos. G-4281, *et al.*, May 28, 1963 (28 Fed. Reg. 5625) (256 cases); *Sun Oil Co., et al.*, Docket Nos. G-8592, *et al.*, August 6, 1963 (28 Fed. Reg. 8333) (25 cases); *Area Rate Proceedings, et al.* (Hugoton-Anadarko area, and Texas Gulf Coast area), Docket Nos. AR64-1 and AR64-2, *et al.*, November 27, 1963. (28 Fed. Reg. 12646) (approximately 1500 and 1000 cases respectively): *Pan American Petroleum Corp., et al.*, Docket Nos. G-19417, *et al.*, December 12, 1963 (28 Fed. Reg. 13908) (82 cases).

The necessity to proceed on an individual basis was interjected into these matters only because Petitioner insisted that review of the regulations issued through Order Nos. 232, 232A and 242 must be handled by the reviewing courts on a case-by-case basis (R. 113 and *Pan American Petroleum Corp. v. Federal Power Commission*, No. 387 this Term, pending). This argument has no relation to the requirement that statutory hearings be granted and records be compiled so that judicial review, however undertaken, is more than the rubberstamping of asserted agency expertise.

¹² The printed Federal Power Commission Reports indicate, 24 F.P.C. 1121, that the lists of respondents, rate suspension proceedings, and certificate proceedings consolidated for joint hearing in this area proceeding, have been omitted in printing the order. The originals of this order indicated that literally hundreds of cases were designated to be handled in this single proceeding on a single record. Order of December 23, 1960, *Area Rate Proceedings*, Docket Nos. AR61-1, *et al.*, Appendices A, B, and C of mimeo copy.

III.

**THE COMMISSION'S THEORY OF STATUTORY
INTERPRETATION DEMANDS THE INTERJEC-
TION OF JUDICIAL AUTHORITY.**

It has long been one of the accepted concepts of statutory construction that an established administrative interpretation of a statute is entitled to great weight. *United States v. Public Utilities Commission of California*, 345 U.S. 295; *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498. But the action of the Commission in issuing Order Nos. 232, 232A and 242 without hearing, and the claim that it has authority to proscribe and prescribe rates and contracts for the future or make findings as to the public convenience and necessity without formal hearing and record support is not entitled to such deference.

First, the failure of the Commission to claim the power or seek to assert it over the years since 1938, and particularly since the advent of the active regulation of producer sales, should deter a latter-day construction of the Act to now include such power — even if it were possible to so construe it. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, *supra*.

Second, administrative construction will not be permitted to override the plain language of the law. Regulations, although entitled to consideration in construing an ambiguous statute, are void when, as here, they are in direct variance with unambiguous statutory provisions. *Mid-Continent Petroleum Corp. v. National Labor Relations Board*, 204 F. 2d 613, *cert. denied*, 346 U.S. 856; *Hope Natural Gas Co. v. Federal Power Commission*, 134 F. 2d 287, reversed on other grounds, 320 U.S. 591; 73 C.J.S., Public Administrative Bodies, and Procedure § 94. Such

direct conflict between the action of the Commission in the promulgation of the questioned regulations and the clear mandates of the Natural Gas Act and the Administrative Procedure Act have been traced above. Also, an administrative construction which is no sooner made than challenged, obviously, cannot turn the scale in favor of that erroneous construction. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144.

Third, this Commission proposes to stretch its jurisdiction and authority to all "imaginative" limits, relying on the courts to restrict any enlargement which becomes too imaginative:

"... we must first examine the limits of our jurisdiction. That examination must be meaningful and imaginative. Surely, if this Commission is timid or myopic in the use of its authority, it will not fulfill its responsibilities to the public interest. The fact that individual members of the Commission, segments of the industry, and of the consuming public, individual members of the Congress, or the Administration itself, may differ with a particular conclusion of the Commission on a jurisdictional matter should not distress us. For those who are affected by our decisions have full recourse to the Courts."

David S. Black, Commissioner, Federal Power Commission.¹³

Certainly there is irony in the fact that the Court below found in this instance that there was not such "full recourse" because the "bootstrap" approach used was so

¹³ See Federal Power Commission Press Release No. 13053, December 9, 1963. Quotation from an address by Commissioner Black to the Sixth Annual Meeting of the Mid-West Electric Consumers Association, Denver, Colorado, December 9, 1963. Printed texts of such speeches are routinely made available through the Petitioner's Office of Public Information. 18 C.F.R. § 3.4(11).

"imaginative" the courts were deprived of an opportunity to properly review the admittedly substantive rulings (R. 117). For this reason, the Tenth Circuit refused to permit the Commission to issue general orders and regulations, resist review of those orders, then apply them in specific instances, but provide no record to support either the general or the specific action. Said the Tenth Circuit: "No amount of administrative expertise can supply these deficiencies" (R. 119).

Only last term, this Court found it necessary to reject efforts of agencies, creations of statutory enactment, to substitute expertise for the clear requirement that their "findings" and actions be based upon evidence of record. Thus, in *Burlington Truck Lines v. United States*, 371 U.S. 156, it was held:

"The difficulty with the order arises in connection with the findings and conclusions relevant to the choice of remedy. The assumption of the Commission was . . . that it had unlimited discretion to apply either remedy simply because either might be effective." 371 U.S. at 165.

"There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice . . . Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion' . . . 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.'" 371 U.S. at 167.

This Court then went on to insist that agency discretion must be exercised and expressed in the context of the statutory standards spelled out in the particular legislative grant. The Court below, in the instant case, said precisely the same:

"... The public interest must be related to and tested by these [statutory] standards [of 'just and reasonable' and 'public convenience and necessity']. Although the Commission is the guardian of the public interest in the administration of the Act, the Commission may not substitute its standards for the statutory standards." (R. 119)

The Court below continued:

"... Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." (R. 119)

This fundamental requirement of due process demanded by the Tenth Circuit certainly comports with the law as reaffirmed by this Court in *Interstate Commerce Commission v. J-T Transportation Co.*, 368 U.S. 81:

"We intimate no opinion on the merits, for it is the Commission not the courts, that bring an expertise to bear on the problem . . . Yet that expertise is not sufficient by itself. Findings supported by substantial evidence are required. *Public Service Com. v. United States*, 356 U.S. 421, 427; *United States v. United States Smelting, R. & M. Co.*, 339 U.S. 186, 193.

"Since the standards and criteria employed by the Commission were not the proper ones, the causes must be remanded for further consideration and for new findings. *American Trucking Association v. United States*, 364 U.S. 1, 15-17 . . ." 368 U.S. at 93.

IV.

THE CASES AND ACTIONS RELIED UPON BY PETITIONER DO NOT SUPPORT AND ARE NOT AUTHORITY FOR CIRCUMVENTION OF THE CLEAR STATUTORY PROVISIONS OF THE NATURAL GAS ACT AND ADMINISTRATIVE PROCEDURE ACT.

Petitioner places primary reliance upon, and claims judicial approval for its alleged "rulemaking" effort, Order Nos. 232, 232A and 242, in this Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, and the decision of the Ninth Circuit in *The Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601, pending on petition for certiorari, No. 689, this Term. Such reliance is clearly misplaced.

In the *Superior* case, the Ninth Circuit accepted, without investigation, the erroneous premises of the Commission, which we have exposed above, and then compounded its error by also accepting *Storer* without adequate consideration of the significant and controlling statutory and factual difference between the action of the Federal Communications Commission (FCC) in that instance, and the action of the Petitioner in the instant situation. In addition, the Ninth Circuit limited its considerations to the favored nation clause in the *Superior* contract, 322 F. 2d at 610, and note 23, and did not discuss the reach of the Commission to the instant flexible pricing clauses.

A basic error, which precludes use of the *Superior* decision as precedent is laid bare by that Court's own words:

"... The procedures to be followed in prescribing or amending administrative rules and regulations, including those of the Commission, are dealt with in section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003,

to which Superior makes no reference. The procedures followed by the Commission which led to the issuance of Order No. 242 . . . comport fully with the requirements of that statute." 322 F. 2d at 608-609.

As this Court said in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, the "major defect of this argument is that it assumes the answer to the very question in issue," 350 U.S. at 340, and "the very premise . . . is itself based on a misconception of the structure of the Act," 350 U.S. 340-341. We have shown above that the Commission did not, because it did not provide for a hearing and the taking of evidence, comport with the requirements of the Administrative Procedure Act (Pet. Br., pp. 14, 27, 29). The same summary disposition which constituted violation of the APA, necessarily breached the specific provisions of the Natural Gas Act which also required a hearing before Petitioner could act. When the Ninth Circuit has investigated the requirements of the APA it has dismissed efforts of the Commission to avoid the statutory hearings provided for there. *Public Utility District No. 1 v. Federal Power Commission*, 242 F. 2d 672.

At the time of passage of the APA, the Attorney General, in correspondence with Congressional leaders, cited the absence of "unanimity of recognition" of what was included in "rulemaking," Legislative History, page 225. Although the definitions in Section 2 of the APA were provided to permit avoidance of confusion such as that displayed by the Ninth Circuit in *Superior*, that Court's failure to delineate between the wholly separate formal and informal rule-making procedures of that one section, Section 4(b) of the APA,¹⁴ led it to its equally erroneous acceptance of *Storer* as precedent for Petitioner's actions in issuing Order Nos. 232, 232A and 242.

¹⁴ "Attorney General's Manual on the Administrative Procedure Act," pages 31-35.

The broadcast portions of the underlying statute, which were the provisions before this Court in *Storer*, do not provide for FCC authority over the rates, charges or private contracts of those licensees who make application for use of the public airwaves. Where the Gas Act has specific requirements that hearings must precede, the issuance of orders promulgating rates or contracts for the future (the rulemaking subject here), the Communications Act (47 U.S.C. 301, *et seq.*) has no statutory requirement of a prior hearing before the issuance of orders which announce "the Commission's attitude on public protection against . . . concentration" of broadcast outlets in a single licensee, 350 U.S. at 203.¹⁵ In fact, this Court's recognition of the "policy" nature of the *Storer* rules is footnoted to the holding, but one term before, in *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, that a hearing is required to support a determination of improper concentration," 350 U.S. at 203, note 12.

In contrast to the Ninth Circuit position, if the order reviewed in *Storer* had dealt with the actual licensing of a project, Section 4(b) of the APA could have had no applicability because licensing is defined as "adjudication" and has no relationship to "rulemaking." Cf. Section 2(c) of the Administrative Procedure Act with Sections 2(d) and 2(e). Because the FCC action reviewed in *Storer*

¹⁵ The Federal Power Commission has from time to time issued policy announcements of its attitude on matters which, when specifically acted upon require hearings and formal adjudication. See e.g. Order No. 185, 15 FPC 793, wherein the Commission advised of its attitude on "routine construction" certificate applications. Despite such a policy pronouncement, issued pursuant to Section 4(b) of the APA, individual applications for routine construction certificates are still heard, as required by the explicit requirements of Section 7 of the Gas Act. Compare also, the holding below that Order Nos. 232 and 232A could stand as "advisory declarations of Commission policy" but that "they determine no rights." (R. 121).

was merely an expression of an "attitude" and was "reconcilable with statutory directions," 350 U.S. at 203, the filing of statements under the informal rulemaking provisions of Section 4(b) of the APA was considered adequate, 350 U.S. at 193. Since the Communications Act did not require a hearing on the policy matters which were the subject of the *Storer* rules, that case cannot be precedent in the instant situation where definite practices bearing upon rates, prices, and contracts to be used in the future were promulgated (R. 20-21) and the statute specifically and plainly required that such matters be decided on the basis of the evidence after hearing — thus activating the formal requirements of the last sentence of Section (4)b of the APA.

The inapplicability of *Storer* to the present circumstances, involving the Federal Power Commission and the Natural Gas Act, is accented by further significant statutory differences between the Gas Act and the Communications Act. Congress had specifically stated in the Communications Act, 47 U.S.C. 314, that ownership or control of a number of station outlets, where the restraint of commerce or the lessening of competition would be the result, was forbidden. The FCC's policy rule merely affirmed that express statutory pronouncement. The exact opposite situation exists in the case of the regulations here. The contract and rate provision rules promulgated by Order Nos. 232, 232A and 242 are in direct contrast to the Congressional intent at the time of passage of the Natural Gas Act.¹⁶

¹⁶ In *Denver Union Stockyards v. Producers Livestock Marketing Association*, 356 U.S. 282 (Pet. Br., p. 25, note 25), this Court confirmed that where the Congressional policy is so clearly stated that only a definition of it is needed, specific hearings may not be required, 356 U.S. at 287, but specifically recognized that "an evidentiary hearing would be necessary" where the reasonableness of an existing practice is challenged, 356 U.S. at 288. As noted above, the Commission's powers being limited to review for "justness and reasonableness," that is precisely what was undertaken here, and a hearing was required.

In *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, this Court found that in relation to the Gas Act it "seems plain that Congress," in "drafting the statute" the way it did intended that natural gas companies "should not be precluded by law from increasing the prices of their products whenever that is economically necessary," 358 U.S. at 113. The rule promulgated by the Commission flies in the face of that express intent for it places added restrictions on the right to file for price increases and, in fact, specifically (and admittedly) precludes use of the very clause to which this Court was directing its attention in *Memphis* (R. 20-21; Pet. Br., p. 26, note 26). Further, while there have been completely unsupported assertions that the outlawed flexible price clauses do not relate to the economic needs of the producers, Petitioner's own past actions refute this groundless claim. Appendix A, *infra*, pp. 61 to 75.

Further important statutory differences exist which make the application of the APA to FCC action, such as that considered in *Storer*, inapplicable to Petitioner's actions and power under the Natural Gas Act. Thus, under its broadcast powers the FCC has no future rate ("rule-making," APA Section 2(c)) powers at all, either before or after hearing, the Petitioner does regulate rates, but only if upon review by it and after hearing they are found to be unjust or unreasonable; the FCC is authorized to grant licenses without hearing, 351 U.S. 204, note 14, the Petitioner under the Gas Act can only license after hearing and on the basis of the evidentiary record, Section 7; *Atlantic Refining Co. v. Public Service Commission*, 360 U. S. 378. Of additional import is the fact that the policy established in the *Storer* rules did not effect a shift in the statutory burden of proof. The applicant carried the same responsibilities both before and after issuance of the FCC

rules; here the burden is shifted as a result of these Commission orders, which find it sitting as judge in a waiver proceeding rather than reviewing rates on factual records. *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137 at 144; cf. *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348.

Other cases principally relied upon by Petitioner are similarly inapposite, and could have significance here only upon the assumption of certain of Petitioner's premises which have already been proven false. Thus, *Securities and Exchange Commission v. Chenery Corporation*, 322 U.S. 194, is presented as authority for the proposition that the choice is the Commission's whether to proceed by general or particular procedure (Pet. Br., p. 21). So be it. *Chenery* did not hold that the underlying statute can be honored when particular procedure is followed, but can be ignored in general cases. This is what Petitioner has done. In contrast, in *Chenery*, this Court held that the Securities Commission:

"... was charged with the duty of measuring the proposed treatment . . . by relevant and proper standards. Only in that way could the legislative policies embodied in the Act be effectuated . . .

"It could do that only in the form of an order, entered after a due consideration of the particular facts . . ." 332 at 201.

In fact, in the first *Chenery* case, the Securities Commission had been rebuffed by this Court, 318 U.S. 80, because it had not complied with the specific statutory requirements during that first proceeding. Such a rebuff is precisely what the Tenth Circuit has given to Petitioner here (R. 121).

Again, Judge Learned Hand is quoted, *National Broadcasting Co., Inc. v. United States*, 47 F. Supp. 940, as asserted authority for the proposition that a general rule

will not be tested when a particular case is presented (Pet. Br., p. 26-27). What could be less properly "authority" in this instance? The *NBC* case was a direct challenge to the regulations — something that Petitioner avoids here (R. 117) by urging that the general rule *can only be tested* when specifically applied (R. 115, 119). Further, Judge Hand's decision makes clear that the regulations before him were not issued until the affected companies:

"... put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license." 47 F. Supp. at 945.

The Commission further seeks to support its arbitrary violation of the statutory restrictions placed upon it by Congress by urging that there is no "constitutional right to a hearing where the subject is legislation or general rule making." (Pet. Br., p. 27). First of all, Congress has not given to the Commission the full range of Congressional powers under the Constitution; but, in contrast, it has placed the definite statutory demand for a hearing on Petitioner through the specific provisions of the Gas Act and the APA. Furthermore, the constitutionality of the Natural Gas Act has only been established in those situations where a full hearing with evidentiary record had and findings announced before the future rate practices were established, *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575. While Petitioner has cited *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, and *Bowles v. Willingham*, 321 U.S. 503, as some authority for the above proposition the latter case illustrates the former has been severely limited, 321 U.S. at 520, and this Court said in the *Bowles* case that where

the statute provides for a hearing before the effectiveness of the agency order "due process requires" that the hearing be granted 321 U.S. at 520. Neither case negates any proposition which we have advanced, or any holding of the decision below.

At page 29 of its brief, Petitioner asserts some sort of almost irrebuttable presumption for the validity of what it has done in issuing Order Nos. 232, 232A and 242. First of all, the sole issue here is the power or authority of the Commission (Pet. Br., p. 2), and not the reasonableness of the Commission's actions. Secondly, *Pacific Box & Basket Co. v. White*, 296 U.S. 176, cited by Petitioner, specifically shows at p. 196 (where Petitioner's partial quote also appears) that "the regulation now challenged was adopted after notice and public hearing as the statute required." (This case, decided some eleven years before the APA, contains some holdings which have been negated by passage of that Act, such as its statement that the proponent of a rule does not have the burden of justification, 296 U.S. 185-186. Section 7 of the APA specifically does place the burden upon the proponent of a rule — unless a statute otherwise provides.) As has been noted earlier, the Natural Gas Act, considered in conjunction with Section 4(b) of the APA, shows that any order of the Commission regarding rates or contracts of future effect is subject to the provisions of Section 7 of the APA and Petitioner does bear the burden. Thus, neither *Pacific States* nor *American Trucking Association, Inc. v. United States*, 344 U.S. 298 (Pet. Br., p. 29) is applicable here.

Commencing at page 29 of its brief, and running through page 38, Petitioner discusses decisions of this Court, other courts, and its own prior actions as support for its claim that its actions in promulgating Order Nos. 232, 232A and 242 did not run in opposition to the substantive provisions

of the Natural Gas Act. As shown below, specific discussion of these cases and orders is not needed here — a goodly number being advanced to support the claim that the findings as to the “public interest” will suffice for an *in haec verba* finding using the statutory language of “present or future public convenience and necessity” or justness and reasonableness. Accepting, for argument, this proposition, the cases only show that hearings required by the Gas Act are still a condition precedent to such “public interest” findings. Petitioner also refers to this Court’s holding in *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 306. But Petitioner omits from its quotation the key holding from this page of the decision — the statement noting that the Commission’s determination that the rates were acceptable in this instance had been made “on the basis of substantial evidence.” Thus, Petitioner’s arguments, and its citations beg the question — or actually support the holding of the Tenth Circuit below, which also demanded substantial evidence to support a “finding” going to rates, contracts or certificates. Similarly, each proceeding referred to in this section of Petitioner’s brief was one in which an evidentiary hearing was held, and the reviewing court found substantial evidence to support the order, or reversed Petitioner for failure to build a sufficiently comprehensive evidentiary record to support its findings.

Obviously, these authorities are all opposed to any *in camera*, sans-record determination of matters arising as to rates, contracts or licenses under the Natural Gas Act.

PRIOR COURT APPROVAL OF FLEXIBLE PRICE CLAUSES AND THE CONGRESSIONAL REFUSAL TO NEGATE THEM ARE OF SIGNIFICANCE.

Previous court approval of the now rejected contract flexible pricing clauses does support the position of the court below (Pet. Br., p. 38). First of all, the judicial enforcement and interpretation of these clauses indicates that they are not *per se* contrary to public policy or harmful to the public interest. Second, in sustaining them, the courts have found both Congressional interest in their continuation, *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, and practical reasons for their existence, *Shell Oil Company v. Federal Power Commission*, 292 F. 2d 149, *cert. denied*, 368 U.S. 915; *Memphis, supra*. This, of course, indicates that there is a clear and genuine doubt as to the merits of the totally unsupported "findings" advanced by Petitioner to support its acts. See Appendix A, *infra*, pp. 61 to 75.

We have never urged, and the Court below did not hold, that, after proper hearing and record, Petitioner could not, pursuant to specific statutory grants of power under the Gas Act, rule on such flexible clauses. But its prior actions in accepting them and finding that their activation produced just and reasonable rates, related to the economic needs of the particular producer, *Wisconsin v. Federal Power Commission*, 393 U.S. 294, do much to undercut the asserted reasonableness of Petitioner's rules and confirm the need for what Congress has required — and the Court below enforced — agency action only upon evidence and after hearing.

The judicial approval of these flexible clauses is most important from yet another viewpoint — this in relation

to Petitioner's point (Pet. Br., p. 39) that Congressional inaction on Petitioner's requests for legislation eliminating certain such clauses is of no significance. In the 1958 decision in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, this Court found that whether in past or future contracts, it was the Congressional intent, and it was reasonable, that "natural gas companies" (which Congress knew covered independent producers) not be precluded by law from the greatest possible flexibility in increasing their prices, 358 U.S. at 113. The consistent refusal of Congress to enact the tendered legislation in the face of this clear pronouncement does have significance as to both past and future contracts, and cannot be limited merely to old contracts as the Ninth Circuit sought to do. But more important is the fact that Petitioner sought legislative authority to act as to both existing and future contracts, and its recommendations were not limited to a request for authority — or for Congressional action — expunging such clauses from existing contracts only. Thus, Petitioner has demonstrated its own lack of confidence in the actions now reviewed here.

VI.

PETITIONER'S ASSERTION THAT THE WAIVER PROVISIONS OF ITS RULES PROTECTED TEXACO'S VALID INTERESTS IS DISPUTED BY THIS RECORD AND PETITIONER'S OWN ACTIONS.

Petitioner asserts that Texaco failed to take advantage of the waiver provisions of Section 1.7(b) of its Rules, and that a hearing was available under these provisions (Pet. Br., pp. 11, 25). Initially, it must be noted that these waiver provisions were not a part of Petitioner's Rules at the time it issued either of its Order Nos. 232, 232A or 242. Nor

did this provision exist at the time Texaco filed its certificate application and its rate schedule (R. 22, 26, 30; 28 FPC 500, 790).

However, as the Court below found, the Commission has resisted the development of "an easy and quick method of reviewing orders which affect substantive rights and which are of general applicability" (R. 113) by urging dismissal of all actions seeking to achieve court review of these orders (R. 113). It is Petitioner's own position that review of these general orders must await impingement of a personal right by a specific order. The havoc wrought upon Texaco, *supra* p. 6, by this delay in determination of its rights has been shared by other producers, and would be compounded were Texaco required to pass through a waiver hearing before being permitted to approach the courts for adjudication of its rights.¹⁷ Thus, waiver, if sought, would have further crippled Texaco's efforts to gain review relief, would have compounded an economic hardship already several years old, and would have further frustrated business planning and sales negotiation throughout the industry, which now looks to these cases for a general delineation of its rights.

Furthermore, the illusory nature of the Section 1.7(b) waiver relief is vividly demonstrated by Petitioner's own actions in the two *Atlantic Refining* cases to which it points (Pet. Br., pp. 25, 26). Although the waiver hearing noticed on September 13, 1962, 28 FPC 469, was held, the record of that matter, Docket No. CI 62-1562, shows that at the hearing of October 11, 1962 all of Atlantic's evidence except the name, address, and qualifications of its witness was

¹⁷ No doubt in any court review of the waiver order Petitioner would assert that the sole test was whether the rejection of an exception to its regulations was an unreasonable "exercise of [its] judgment" (Cf. Pet. Br., p. 29); and would resist analysis of the underlying regulation. (R. 112)

stricken. Despite the fact that rehearing had been granted to determine the "precise meaning" of the contract terms, and whether they violated the new regulations, even Atlantic's testimony as to the meaning of the contract language was stricken. Testimony of Atlantic's witness as to the effect on it of Order No. 242 and Atlantic's reasons for inclusion of the flexible pricing clauses in the contract was also stricken. The Commission Staff adduced no evidence.

Final briefs in this matter were submitted January 11, 1963.

No action has been taken by the Examiner who heard the case. The certificate application of Atlantic is still not on file, and, thus, no sales have yet taken place.

The public record surrounding *Atlantic Refining Co.*, Docket No. CI 63-576, (Pet. Br., p. 26, note 26) is equally revealing. Although the order referred to, 29 FPC 384, purported to "preserve" Atlantic's rights, Petitioner's action has had the exact opposite effect. Atlantic had contracted for a flexible clause which paralleled the language approved by this Court in its *Memphis* decision, *supra*. Although Petitioner granted rehearing to allegedly consider the merits of its act in "forbidding" such clauses, Atlantic was suffering practical business difficulties which demanded that sales be initiated immediately.

To preserve its rights and permit rehearing Atlantic submitted an amended contract which held the "forbidden" clause in suspense, and ineffective, unless eventually found to be "acceptable". By order of May 31, 1963, reproduced herein as Appendix B, *infra*, pp. 77-78, Petitioner rejected this filing because the proscribed contract terms still ap-

peared in the document; although Petitioner accepted they were "inoperative and of no force and effect," Appendix B, *infra*, p. 77.

The Commission's files indicate that Atlantic could not hold out financially in this situation and on June 17, 1963, was forced to forego its "rights" and drop the clause completely so filings could be made. Since Atlantic no longer has the contract referred to (Pet. Br., p. 26) the promised "rehearing" or "waiver proceeding" will not materialize.

The course of these first two waiver proceedings under the new rules should conclusively demonstrate that such a course can not substitute for the statutory hearing required by Sections 4, 5 or 7 of the Gas Act and Sections 4, 5, 7 or 8 of the APA.

VII.

VENUE TO REVIEW THESE PARTICULAR ORDERS OF PETITIONER WHICH AFFECTED TEXACO WAS PROPERLY, AND FACTUALLY, IN THE TENTH CIRCUIT.

Section 19(b) of the Natural Gas Act spells out the procedures for seeking judicial review of Petitioner's orders and, in addition, provides that venue for this review is as follows:

"Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, . . ."

In the lower Court, Petitioner moved to dismiss Texaco's Petition for Review on the grounds that Texaco's principal

place of business is not situated in the Tenth Circuit and that Texaco is not "located" within that circuit in the sense of this statute (R. 109). Petitioner narrowly construes the term "located" and contends that term applies only to the circuit which includes the state of incorporation. The Tenth Circuit overruled the Commission's motion to dismiss for improper venue holding that the question of "location" was one of fact to be determined in each particular case and that under the facts of the instant case, venue properly lay in the Tenth Circuit (R. 109-12). Because of the uncertainty created by the Commission's continued refusal to accept the Tenth Circuit's ruling on this matter, Texaco urges that this Court clarify the venue provisions by affirmance of the decision below on this point.¹⁸

A. Contrary to Petitioner's assertions, a venue provision is designed for the convenience of the affected party.

The primary purpose of statutory venue provisions is the legislative intent to afford the affected parties a convenient judicial forum. Petitioner's narrow construction of the word "location" as encompassing *only* the state of incorporation is at sharp variance with this fundamental precept of venue as stated by this Court in *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635:

"... Venue relates to the convenience of litigants. [Citation omitted] The provisions of Section 19(b) plainly are of that character. Review in the Court of Appeals for the District of Columbia where the Commission must maintain its principal office and hold its general sessions ([June 23, 1930] 46 Stat. 797, 16

¹⁸ See, *Gulf Oil Corporation, et al v. Federal Power Commission*, No. 21151 (5th Cir.) pending, where the Commission has moved to dismiss on the grounds that the petitioners there are neither incorporated in nor have their principal place of business within the Fifth Circuit.

USCA §792, 5 FCA title 16, § 792) is convenient for the Commission. *Review in any circuit where the natural-gas company is located or has its principal place of business is designed to serve the convenience of the company . . .*" 324 U.S. at 639

The Commission (Pet. Br., p. 44, note 42) recognizes that "many corporations maintain neither offices nor employees, but only a statutory agent, in the state of their incorporation." Certainly such circumstances would not make litigation at *that* location a convenient one for any litigant so situated.

Moreover, in keeping with this Court's *Panhandle* decision, *supra*, it is doubtful that the Commission even has standing to challenge venue in a review proceeding under Section 19(b) if review is brought in a circuit other than the District of Columbia. As this Court observed in the *Panhandle* case, "Review in any circuit where the natural-gas company is located . . . is designed to serve the convenience of the company." Venue is a personal privilege which may be waived by the privileged party, but improper venue can only be challenged by the party to whom the privilege runs and who is thus inconvenienced by the wrong situs of the action. The "located" venue portion of Section 19(b) vests a venue privilege only in the natural-gas company and not in the Commission.¹⁹

One not uncommon situation arising under the Natural

¹⁹ The Commission's right to challenge venue in the instant case is further clouded by its laches. Its motion to dismiss was not filed until 80 days after the filing of Texaco's petition to review and some 45 days after it had itself certified the record to the Tenth Circuit. The certification of the record submitted this cause to the jurisdiction of the Tenth Circuit and clearly should have resulted in a waiver by the Commission of any right which it may have had to challenge venue. *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 453.

Gas Act accents the logic and convenience afforded by the holding of the Court below.

The appellate venue provisions of Section 19(b) also determine where intervenors and Section 7(a) applicants seeking connections from long-line pipelines are required to bring appellate review proceedings. To limit such parties, whose participation in Commission proceedings is expressly authorized by the Natural Gas Act, to the circuit covering the state of incorporation or principal place of business of the natural gas company could create an extreme inconvenience for them. See for example, *Central Illinois Public Service Co. v. Federal Power Commission*, No. 14454 (7th Cir.) pending, where the natural gas companies affected by the order are Panhandle Eastern Pipe Line Co., a Delaware corporation with its principal place of business at Kansas City, Missouri, and Trunkline Gas Company, a Delaware corporation with its principal place of business at Houston, Texas. Here, the petitioner seeks review of acts going to new connections to be made to the lines at points in the Seventh Circuit's area. The Illinois distribution company intervenor is certainly more inconvenienced by having access to the Seventh Circuit, than by being forced to seek review in the Third, Fifth or Eighth Circuit as Petitioner's theory would demand. Further, such proceeding has been brought to review Opinion No. 402, *American Louisiana Pipe Line Co.*, Docket Nos. G-2306, *et al.*, issued September 17, 1963, and in the opinion the Commission itself notes that certain major arguments advanced to it "are questions of Illinois law." (mimeo, p. 21).

B. The finding of venue for Texaco in the Tenth Circuit in this case comports with the legislative intent of the statute.

The pertinent language of Section 19(b) was initially copied from Section 313(b) of the Federal Power Act.²⁰

²⁰ U.S.C. 8251(b).

Significantly, however, the legislative history of the Gas Act shows that after Congressional committee hearings on the new bill, the words "is located" were specifically substituted for the word "resides" which appeared in the initial draft of the bill. This deliberate legislative substitution clearly reflects an intent of Congress not to limit the appellate venue provision to the state of incorporation, and the Court below so held (R. 111). At the time Congress substituted the words "is located" for "resides" there existed a long and clear line of federal decisions holding that the term "resides" as used in federal venue statutes means only the state of incorporation.²¹ Since Congress is presumed to be aware of existing law and precedent when it acts, *Shapiro v. United States*, 335 U.S. 116, if it had intended or desired to narrow the venue provision to cover only the state of incorporation, it would have retained the word "resides."

Petitioner contends this deliberate substitution was "merely stylistic," and undertaken to replace a personal term ("resides") with an impersonal term ("located"). (Pet. Br., p. 43). The tenuous nature of this "style" argument is illustrated by the fact that Congress has been content in drafting the general federal venue statute, 28 U.S.C. 1931, to use the "personal" term "resides" to lay venue for both natural and legalistic persons and both natural and legalistic persons are covered by the Gas Act. Moreover, Petitioner's position ignores the acceptance by the court below (R. 111) of the general rule of statutory construction that a specific legislative change in phraseology made in subsequent drafts of an already drafted bill indicates that a departure from prior law and prior considerations was intended. Cf. *Shamrock Oil and Gas Co. v. Sheets*, 313 U.S.

²¹ These authorities are extensively reviewed and collected in *Suttle v. Reich Bros. Construction Co.*, 333 U.S. 163.

100, 106; *Spring City Foundry v. Commissioner*, 292 U.S. 182, 187; *Brewster v. Gage*, 280 U.S. 327, 337.²²

Finally, the Commission asserts that failure to confine the term "is located" to the state of incorporation would make the insertion of the phrase "principal place of business" a redundant act, (Pet. Br., p. 45).²³ As will be shown, under Texaco's interpretation as adopted below no redundancy of interpretation necessarily exists, and to the extent that it might, similar redundancy occurs in Petitioner's interpretation; but, most significantly, the Tenth Circuit found the conscious Congressional change in terminology to be of far more significance than any slight overlap in phraseology (R. 111).

Texaco urged and the Court found that the requirement of being "located" in a particular circuit is met by the conduct in such circuit of substantial business operations relative to the matters under review (R. 2, 3, 109, 111). This then, is a question of fact to be determined in each particular case. Cf. *Colorado Interstate Gas Co. v. FPC*, 142 F. 2d 943, 950, affirmed 324 U.S. 581, and no redundancy is necessarily inherent in this interpretation. Additionally, for Petitioner to avoid its own redundancy or overlap argument, it would have to offer assurance that no natural-gas company would ever have its principal place of business

²² In *Creek County v. Seber*, 318 U.S. 705, 714, this Court, in construing the effect of language changes in an Act of May 19, 1937, 50 Stat. 188, c 227, from an Act of June 20, 1936, 49 Stat. 1542 c. 622, stated: "We cannot accept the view that the substantial changes in language were only matters of style."

²³ In discussing this point, Petitioner erroneously represents that Texaco has urged the equation of the factual test which determined "location" with the broad interpretation given to the concept of "doing business" (Pet. Br., p. 45). Texaco, disclaimed below and disclaims here any such position. The statement of the Court below referred to by Petitioner (R. 111) was added to make clear that Court's position, and not to reject any argument made by Texaco.

in the same circuit in which it was incorporated. Reference to one example, the Sun Oil Company, a New Jersey corporation with its principal place of business at Philadelphia — both within the Third Circuit — illustrates that such assurance cannot be given.

Natural gas companies, particularly producers of natural gas, frequently conduct their business as individual proprietorships or partnerships. In fact, Petitioner's orders initiating area proceedings, *supra*, p. 30, indicates substantially more private operators named as respondents than corporations. If the provision "is located" is restricted to the state of incorporation, as the Commission urges, it would result in Congress having established a venue provision which was totally meaningless and inapplicable to a great many natural gas companies. Hence, it is actually Petitioner's own theory of an excessively narrow statutory interpretation which would fail to give effect to all provisions of the statute (Pet. Br., p. 45).

Petitioner has urged (Pet. Br., p. 18) that the regulation of natural gas companies can give rise to complex questions of contract law and interpretation. When the Commission rules on such questions through the application of the canons of contract construction it is not operating in an area of its expertise, and the reviewing court of appeals is fully justified in making its own independent determinations of the governing principles of contract law. *Texas Gas Transmission Corporation v. Shell Oil Co.*, 363 U.S. 263, 270. Contract interpretation raises substantive issues which, under *Erie R. Co. v. Tompkins*, 304 U. S. 64, are controlled by applicable state law. Thus, it is obviously sound venue policy to permit such questions of substantive contract law to be reviewed by the court in the circuit which includes the state whose laws are to be applied, rather than the court whose circuit includes only the often dis-

tant state of incorporation. The decision below permits this more practical approach (R. 111); Petitioner's position frustrates it.

Petitioner's statutory interpretation argument also ignores a significant provision in the venue section under consideration. Section 19(b) provides for review in "any circuit wherein the natural gas company . . . is located . . .". "Any," rather than being a term of limitation, is consistently interpreted as equivalent to "every" or "all."²⁴ Had Congress intended to limit "is located" to the state of incorporation, it more logically would have used the more restrictive terminology "the circuit" rather than the expansive "any circuit."

This rationale was the basis for the decision in *Roedler v. Vandalia Bus Lines*, 281 Ill. App. 520, 523 a suit for personal injuries brought in Saint Clair County, Illinois. Defendant moved to dismiss on the grounds proper venue lay only in Madison County, Illinois, its principal place of business. Defendant was a quasi-public corporation which under Article 2 of the Illinois Civil Practice Act could only be sued "in any county where the corporation is located." In overruling the defendant's motion, the court held:

"'Any' is equivalent to and has the force of 'every' or 'all' . . .

"Hence it would appear that the legislative intent was that such corporation could be sued in every county in which it was located. Had it been the intent that suit could only be brought in the county where the principal office was located, it would seem that the

²⁴ *Boyd v. Bell*, 203 P. 2d 618, 226 (Ariz.); *Lambert v. New England Fire Insurance*, 90 A. 2d 451, 455 (Me.); *Branham v. Minear*, 199 S.W. 2d 841, 846 (Tex. Civ. App.); *State v. Rosecliff Realty Co.*, 62 A. 2d 488, 490 (N.J.); *Egan v. Laemmle*, 25 N.Y.S. 330, 332; *Randolph County v. Walden*, 206 S.W. 2d 979, 983 (Mo.).

legislature would have used the word 'the' instead of 'any' preceding the word 'county.' The word 'located' as we view the matter, used in conjunction with the expression 'any county' refers to all counties in which the corporation has a place of business or exercises its corporate power; . . .'

In construing the meaning of "is located" the doctrine of *noscitur a sociis* requires consideration of the words used in association with this term in the statute. *Polaroid Corp. v. C.I.R.*, 278 F. 2d 148. The use of the provision "any circuit" rather than "the circuit" clearly reflects that Congress intended "is located" to receive a broad rather than a narrow interpretation.

C. Petitioner's authorities are generally not venue cases, or are situations arising under special, limited statutes.

The lower court correctly noted that the extensive litigation under the Natural Gas Act had previously failed to produce a direct answer to the venue question raised by Petitioner (R. 109). Texaco respectfully submits that the well-reasoned holding of the Tenth Circuit below on this issue is sound both in policy and law and should be adopted by this Court.

In support of its contrary position, the Commission relies on broad dictum and the use of the words "located" and "location" by various courts in a context involving issues other than venue.²⁵ The parlance used by a court in dis-

²⁵ *National City Bank of New York v. Domenech*, 71 F. 2d 132, applicability of state tax to a national bank; *Stanton v. State Tax Commissioner*, 26 Ohio App. 198, 159 N.E. 340, domicile of corporation for purposes of intangible personal property tax; *Carter v. Spring Perch Company*, 113 Conn. 636, 155 Atl. 832, effect of Articles of Incorporation upon directors' right to move a plant to another state; *San Jacinto National Bk. v. Sheppard*, 125 S.W. 2d 715 (Tex. Civ. App.), scope of tax exemption statute.

cussing legal issues unrelated to the question of venue is neither basis nor authority for deciding the venue issue in the instant case.

Petitioner further places reliance upon a series of cases involving suits against national banking associations. Such decisions are *sui generis* since national banks are unique corporate entities which owe their existence entirely to special federal laws. As such, they have no state of incorporation and are not deemed citizens of the states in which they do business. As agents of Congress, they could not be sued without consent. 7 Am. Jur., *Banks*, §§ 7-12. Therefore, special statutes establishing requirements for jurisdiction and venue were passed.²⁶ Such statutes permit suits in federal courts against a national banking association only in the district where it is "established," 12 U.S.C. 94. Nevertheless, Petitioner relies on a series of cases holding "established" means the principal place of business specified in the organization charter.²⁷ The interpretation given by the courts to the term "established" under the national bank statutes is in no way determinative of the meaning of "is located" under Section 19(b) of the Natural Gas Act. Moreover, by equating "established" with principal place of business rather than state of incorporation, these cases would create a total redundancy in Section 19(b) if deemed controlling as to the proper interpretation to be given "is located."

At page 47 of its initial brief, the Commission quotes in part from the opinion of the City Court of New York

²⁶ These statutes are fully set forth and analysed in *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555.

²⁷ *Leonardi v. Chase National Bank of City of New York*, 81 F. 2d 19; *Buffum v. Chase Nat. Bank of City of New York*, 192 F. 2d 58; *International Refugee Organization v. Bank of America*, 86 F. Supp. 884; *Schmidt v. Tobin*, 15 F. Supp. 35.

in *Raiola v. Los Angeles First National Trust & Savings Bank*, 233 N.Y.S. 301, 302, 133 Misc. 630. This was an action in a state court against a national bank which, for the reasons stated above, provides an extremely limited precedent. Statutory provisions, 12 U.S.C. 94, permit actions to be brought in the state courts against national banks in any state, county or municipal court "in the county or city in which said association is located." In granting the motion to dismiss of the defendant, whose principal place of business was Los Angeles, California, the New York City Court relied on *First National Bank of Charlotte v. Morgan*, 132 U.S. 141, which found:

"... This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts."

This reasoning is exactly the policy consideration which Texaco urges this Court recognize in determining whether Texaco shall have access to the Tenth Circuit for review of Commission orders affecting its business activities carried on and managed from offices in that circuit. When not dealing with national banking associations, the New York courts have interpreted "is located" in state venue statutes to apply not only to the principal place of business, but to any branch office. *Dairy Sealed, Inc. v. Ten Eyck*, 288 N.Y.S. 641, 159 Misc. 716.

Finally, the Commission relies upon dictum from this Court's decision in *Cope v. Anderson*, 331 U.S. 461, 467, involving no issue of venue but rather the question of the situs of a cause of action for statute of limitation purposes

(Pet. Br., p. 48). The partial quotation offered is clearly not in point, dealing as it does only with the question of the citizenship of a national bank for purposes of federal diversity jurisdiction and not with venue questions.

There remains one additional argument advanced by Petitioner which should be noted. Petitioner urges that a narrow interpretation of the venue provisions of Section 19(b) will tend to limit "forum shopping" (Pet. Br., p. 40). To suggest that some of the federal Courts of Appeal are less qualified or less fair to litigants than others is to show the utmost disrespect for these highest courts of right in our federal judicial system. Petitioner's concern over the alleged problem of "forum shopping" is totally without foundation in this record, without merit, and, we assert, should be bruskiy dismissed by this Court.

On the basis of the legislative history, controlling principles, of statutory interpretation, sound public policy, and the uncontested facts of record the ruling of the lower court with respect to the venue provisions of Section 19(b) should be affirmed. This ruling recognizes that the requirement of venue is predicated upon the concept of insuring a convenient forum for the parties. The narrow interpretation urged by Petitioner of limiting "location" to the state of incorporation is completely contrary to this principle, disruptive of smooth administration of the Natural Gas Act and contrary to principles of statutory construction as considered in the applicable case law.

CONCLUSION

For the foregoing reasons the decision and judgment of the Tenth Circuit in No. 7217, below, should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

1. The Commission's background arguments and asserted reasons for acting are disputed by its own statements and actions.

Only last term this Court had occasion to remark: "The courts may not accept appellate counsel's post hoc rationalizations for agency action." *Burlington Truck Lines v. United States*, 371 U.S. 156 at 168; cf. *Lawn v. United States*, 355 U.S. 339 at 354 (court review limited to the certified record); *McClellan v. Carland*, 217 U.S. 268 at 283. Petitioner's brief, particularly pages 15-19 thereof, and the entirety of the brief *Amici Curiae* urged by the California Public Utilities Commission,¹ are devoted to such rationalizations and non-record matters.²

Texaco disputes these assertions and contends that substantial evidence could have been adduced (had the opportunity been granted) to establish the inaccuracy of these rationalizations and alleged "findings."

We have argued and briefed the true issue of "power to act" in the main portion of this brief. While we are confident this Court will not accept what it "may not accept," *Burlington, supra*, we feel constrained to correct, by logic and reference to prior actions of Petitioner, the erroneous implications flowing from its background argu-

¹ Hereinafter referred to as "Cal. Br."; and the covering motion, as "Cal. Motion." Texaco and Pan American have filed a joint answer to the California motion resisting acceptance of the tendered brief on the grounds that it is addressed only to so-called "salient reasons" for the regulations challenged here (Cal. Br., p. 5), although it recognizes that the true "issue" before the court goes only to the "power" of the Commission (Cal. Motion, p. 2).

² Petitioner's brief, pp. 15-19, contains reference to but one record page (R. 24), itself a statement of conclusions unsupported by any evidence.

ments. We have placed these remarks in this separately-covered Appendix to insure that they do not cloud the actual issues before the Court.

Petitioner asserts that the decision below requires that it deal with "the subject" (the validity of prices and contract provisions) on a "case by case" basis (Pet. Br., p. 15). Quite to the contrary, the record establishes that it was the Commission, not the Court below, which asserted that "case by case" review was the alternative to the informal rulemaking approach first used (R. 119). The Tenth Circuit specifically noted that the "problems of area pricing are not presented here" (R. 121). Thus, its decision could not have foreclosed consideration of "the subject" of the justness and reasonableness of rates and contracts or the present or future public convenience and necessity on a consolidated or generalized basis. All that the Tenth Circuit required was the granting of the "statutory right to a hearing" (R. 121), thus to provide a "record of facts" against which a reviewing court could test the legal sufficiency of the Commission's findings (R. 119).

Petitioner further alleges that flexible pricing clauses "move the producer's price to the highest prevailing level" (Pet. Br., p. 15), and that such increases are provided "Whenever a higher price is paid" (Pet. Br., p. 15, note 14). This record shows that under pricing provisions such as those Petitioner has declared unlawful, prices do not indiscriminately rise. The very clauses of record will operate but once or twice in the next twenty years (R. 51, 88)—hardly "whenever a higher price is paid." Furthermore, strict tests for comparability of gathering, compression, quality, dehydration or any other matter having a bearing on price "must be taken into account" before some other price can influence the prices for the sale at issue (R. 51-52). Clearly, something substantially below "the highest prevailing level" can result from such a comparison.

At page 16 of its brief, Petitioner comments on the purported transition from a "sellers' market" to a "buyers' market"; on an alleged "flood of increased rate filings" to which flexible price clauses are said to have "greatly contributed;" and on the upward trend of wholesale prices. No better illustration of the need for the development of record facts could be found. Wholesale price averages are a combination of prices under past sales contracts and prices for new sales commitments. If a "sellers' market" follows upon a "buyers' market," as the Commission asserts it has, it must be because of general supply inadequacy. When this happens, it is the prices for the currently contracted new supplies which increase, thus raising the average price of all sales. Further, as an extractive industry gears to a crash exploration and development program to provide urgently needed increased supplies, it must necessarily range wider (to difficult mountain and treacherous offshore areas) and drill deeper (15,000 to 20,000 feet) to seek previously untapped sources of gas supply. Necessarily greater financial burdens pile upon an extractive industry pushing the horizons of its activity to seek out these new, more-difficult-to-reach sources of supply, increasing the outgo of funds and demanding increased revenues from present sales. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 113.

The rising new prices obviously increased the weighted average of wholesale prices of all natural gas (Pet. Br., p. 16, note 15), but such bald references give no indication of the role price increases for existing sales played in this rise, nor do such assertions give any basis for a determination of the part the so-called indefinite clauses, as opposed to the role "permissible" increases, played in such a rise. What numerical portion of the 735 increases (Pet. Br., p. 16, note 17) derived from "permissible" as opposed to "forbidden" clauses is significant, but never explored, and issues

such as these can never be clarified without an evidentiary record. Despite the broad condemnation of clauses in the regulations, the initial producer "rule-making" proceedings did not purport to consider the full range of clauses which the Commission eventually outlawed (R. 15-17, 21). Also, there is no record to show what portions of the increases flowing from allegedly indefinite pricing clauses were created by each of the various kinds of now-outlawed clauses. Obviously, clauses such as those in the contracts of record (R. 51, 88) could not have contributed to any "flood" unless the specific time for their effectiveness had arisen.

Turning to the question of timing:

"Timing of increased rate filings," says Petitioner (Pet. Br., p. 17) enters into the problem because under flexible price clauses an increase might be contractually provided at a time "quite unrelated to the producer's economic need."³ Reason stumbles at the claim that the "definite" price clauses in the contracts before this Court (R. 50-51, 87) demonstrate a greater relationship to the producer's economic need than the "forbidden" clauses in the same contracts (R. 51-52, 88). Each type of increase will happen at a particular stated time, and the price to be charged will be determined with specificity before it is filed and becomes effective. Further, and directly refuting its concern over timing of increases, the Commission has argued (Pet. Br., p. 18, note 21) that its regulations do not limit the "number of times" increases may be filed nor the "level" which can be filed for. If a producer is still supposedly free to contract to file for increases at any time to any level, the new regulations obviously do not reasonably

³ The "record" reference provided at this point by Petitioner, is, of course, not to facts of record but only to similar conclusory and unsupported statements appearing in its general orders.

counteract the alleged ills which the Commission advances as reasons for their issuance.

And the question of economic need:

Is it the economic need of the particular producer that concerns the Commission, or economic need of all producers in an area, or, perhaps, just a sample of producers in an area?

Under the "area" approach to producer regulation now being urged by Petitioner, see *Wisconsin v. Federal Power Commission*, 373 U.S. 294, it is claimed that "just and reasonable" and, presumably, economically-needed rates do not depend upon cost or economic presentations by the particular producer seeking a price increase. (In fact, evidence of individual producer economic need has been forbidden in these proceedings.) As phrased by Petitioner in its *Statement of General Policy No. 61-1*, 24 F.P.C. 818 at 820:

"... we will, in determining whether the higher price is justified, not necessarily consider only the fundamental requirements of the individual producer proposing the price, but will consider all of the above elements relevant to the industry in the area concerned."

In oral argument to this Court in the *Wisconsin* case, *supra*, Petitioner's General Counsel described its thinking on the economic need point:

"MR. SOLOMON: . . . having gone through this difficult process for the first time in a major rate case, the Commission, as of that date, and the Commission as of this date, also was convinced that individual-company, cost-of-service pricing for independent producers of natural gas who are selling a commodity, gas, to the pipelines, was not a feasible, workable, meaningful way of regulating this problem."

Argument of January 9, 1963, Tr. 47-48.

We urge that Petitioner cannot have both arguments — it cannot strike price clauses by arguing individual economic need, but judge prices without concern for individual economic need.

We further urge notation of the inconsistency in Petitioner's argument on the one hand about a single producer's economic need (Pet. Br., p. 17) and its claim on the other hand that there are "no significant variations" in the situations of hundreds or thousands of individual producers (Pet. Br., p. 21). Obviously, if the latter claim is true then Producer A does have an economic need for an increase at the time of the "fortuitous" circumstances of Producer B negotiating a higher price.

Petitioner is further inconsistent in asserting that "the producer's economic need" can somehow be a standard for the *filing* of an increase but not a standard for the *approving* of the increase. This, in turn, parallels the inconsistency of arguing at one page that "fortuitous circumstances" of timing of price increase filings must be avoided (Pet. Br., p. 17), and then arguing but two pages later that producers should use short-term contracts, at the termination of which they will be free to make rate increase filings "fortuitous" as to *both time and amount*.

Small wonder this Court demands that there be evidence, together with findings and analysis justifying agency action lest "*expertise, the strength of modern government, . . . become a monster which rules with no practical limits on its discretion.*" *Burlington Truck Lines v. United States*, 371 U.S. 156 at 167.

At page 17, Petitioner further alleges that the existence of the "forbidden clauses" frustrate its certificate responsibility because (1) it cannot determine in advance when increases may be filed, and (2) it cannot estimate economic

feasibility of projects without knowing a "predictable ceiling upon the cost of supply." As to (1):

(a) Petitioner's regulations do not forbid increased tax reimbursement provisions (R. 20) although the time and amount of their effectiveness cannot be known in advance,

(b) A number of the clauses now outlawed, including those in this record (R. 51, 88) do provide a definite time "when the producer will be able to file,"

(c) Petitioner objects to clauses permitting an "indefinite increase," yet the regulations as promulgated (R. 20) and the use of short-term contracts as advocated (Pet. Br., p. 19, note 21) provide indefinite increase possibilities,

(d) Pipeline natural gas companies can use "Memphis clauses" permitting the filing of an increase at any time,

(e) Contrary to its present position that it must forecast future events, Petitioner has previously urged that at the time of certification, "the Commission should not be required to speculate as to the facts that may exist twenty years or more in the future." *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, Brief of the Federal Power Commission, p. 29.

As to (2), the indefiniteness of gas supply costs:

(a) State commissions have for years been required to estimate the economic feasibility of projects despite the fact that the supplying interstate pipelines, can and do, with Petitioner's approval, retain the right to file at any time for any amount of a rate increase,

(b) Petitioner's short-term contract suggestion would make the determination of economic feasibility even more difficult to ascertain since both the assurance of the supply and the price ceiling would be indefinite,

(c) We are uncertain how the Commission could make a firm analysis of project-long projected purchase gas cost under the rolled-in rate approach which it advocates, *Battle Creek Gas Co. v. Federal Power Commission*, 281 F. 2d 42, since each later expansion, or mere purchase of additional system gas supplies, will have a presently unknown effect on the cost of gas supply of the first project.

Petitioner next asserts that the interacting and cumulative effect of the "forbidden" clauses will tend to bring all prices to a given level throughout the area. Subject to the qualifications noted above about the necessary limitation of reaction of one price to a higher non-comparable purchase in the area, and also subject to the recognition that the areas in these pricing clauses (R. 51, 88) are substantially more narrow in scope than Petitioner's delineated pricing areas, 24 F.P.C. 818, the result complained of really produces a reaction which is consistent with the producer regulatory theory now being espoused by the Commission. If the goal of the Commission is to achieve prices "for the gas itself from any source questioned," 24 F.P.C. at 820, producers should be permitted a vehicle which allows a filing to that level.⁴

"Another serious factor" allegedly arising from the existence of the now-forbidden clauses is the purported need for "contract interpretation" by Petitioner, a process which it is said could delay disposition of producer price increase matters (Pet. Br., pp. 17-18). First, we note that it is not

⁴ " . . . The effect of a contract clause of this type, of course, is only to permit the producer to resort to the filing provisions of § 4(d) of the Act. . . . Thus we have sustained the right of a seller to file an increase under a contract which, in effect, authorized him to do so at any time. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103. The . . . clauses here are far more limited in scope, depending as they do on the occurrence of external events." *Wisconsin v. Federal Power Commission*, 373 U.S. 294 at 304.

necessary for the contract question to be finally settled before the rate is tested. See *Wisconsin v. Federal Power Commission*, 373 U.S. 294 at 301; 24 F.P.C. 537, at 577. If the rate would not be just and reasonable, regardless of the right to file for it, the matter can be just as quickly disposed of in that manner. Second, the new regulations allow continuance of increased tax reimbursement clauses (R. 20). However, these "acceptable" clauses are presently giving rise to a number of rate change filings disputed as to contract right. See e.g., *Skelly Oil Co. et al.*, Docket Nos. RI64-13, *et al.*, order of October 10, 1963; *The Pure Oil Co. et al.*, Docket Nos. RI64-28, *et al.*, order of July 24, 1963. Obviously, mere dispute does not provide a basis for prohibition of certain pricing clauses.

We also note that the new regulations do not necessarily eliminate the need for these "contract" hearings. The *Atlantic* order referred to by Petitioner (Pet. Br., pp. 25-26) was issued because:

"... the language of the pricing provisions in Atlantic's contract is equivocal and we deem that a hearing should be held to determine their precise meaning and whether in fact such provisions are proscribed by Section 154.93."

Atlantic Refining Co., 28 F.P.C. 469.

The regulations may well have just substituted one type of contract hearing for another.

Also, on the contract hearing question, it is settled that the Commission has no special expertise in the decision of such questions, *Texas Gas Corp. v. Shell Oil Co.*, 363 U.S. 263 at 268, and, thus, they can be settled in other forums better equipped to dispose of such contract matters. Any need for expedition could be achieved by a simple directive that the dispute be settled in the state or federal court having jurisdiction over the question. Nor do the delays

surrounding these matters arise in quite the manner Petitioner would imply (Pet. Br., p. 18). For example, the "thirty-eight" filings referred to, which were "tendered four years ago" are just now before the courts because of the following chain of events:

(a) The first of these increases was filed with the Commission about March 1, 1959. (See unreported order, *Shell Oil Co., et al.*, Docket Nos. RI61-515, *et al.*, issued June 26, 1961.)

(b) By an order issued on June 24, 1961, a hearing on the contract issue, was set to commence on July 24, 1961 — more than two years after the first of the increases was filed.

(c) The hearing, which consumed only thirteen actual hearing days, was, because of recesses, not concluded until November 20, 1961; and final briefs were received on April 19, 1962, 29 F.P.C. at 511.

(d) The presiding examiner who had heard the matters died during the briefing period; a new examiner was not appointed until May 21, 1962, 29 F.P.C. at 511-512.

(e) This examiner's initial decision was entered on July 24, 1962, 29 F.P.C. at 510.

(f) After the filing of exceptions, the Commission opinion did not issue until March 15, 1963, although the majority state "[t]he examiner's decision, and the *Pure Oil* opinion upon which it is based, fully dispose of this case," 29 F.P.C. 498, 503.

(g) Rehearing was denied by the Commission on April 26, 1963, 29 F.P.C. 851.

Clearly, the out-of-hand, without-record-support rejection of contracts and the setting aside of contract price clauses

is not supported by pointing to self-inflicted delay in some limited case.

Petitioner has also argued that it must be given a "prompt and comprehensive" mechanism of control to avoid a regulatory breakdown (Pet. Br., pp. 18-19). In the specific sections of the Natural Gas Act, Congress has provided the only means of regulatory control which it expects this agency to follow. Merely because, after ten years of active producer regulation, the Commission still has not settled upon the major principles by which to test the justness and reasonableness of producer sale prices and contracts is no reason to now judicially give it plenary authority to act. Certainly "prompt and comprehensive" action could be had if Petitioner were merely to set prices firmly and finally, without hearing or evidence, and then were to reject all other prices. But Congress did not grant such power, *Bowles v. Willingham*, 321 U.S. 503, and Petitioner has been told:

"If changes in the law are needed . . . it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them."

Mississippi River Fuel Corp. v. Federal Power Commission, 202 F. 2d 899, at 903.

This is, of course, derivative from the principles reiterated in this Court's instruction in *Burlington Truck Lines v. United States*, 371 U.S. 156:

"Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body. . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence. . . . Here the Commission made

no findings specifically directed to the choice between two vastly different consequences . . . Nor did it articulate any rational connection between the facts found and the choice made . . .

" . . . Commission counsel now attempts to justify the Commission's 'choice' of remedy . . ." 371 U.S. at 167, 168.

The Court below saw it this way:

"The Commission held no hearings relative to the promulgation of Order Nos. 232, 232A and 242. Nevertheless, the Commission made findings allegedly justifying such orders. . .

" . . . the Commission may not substitute its standards for the statutory standards. Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them." (R. 118, 119).

2. The arguments of California are equally erroneous and contrary to provable fact.

The factual arguments sought to be interjected into this proceeding by California are similarly without record support, and are directly disputed by Texaco. California asserts that "[p]rice can *definitely* be stated and *fixed* for the full term of the contract. The Commission, in the exercise of its judgment, has recognized this." (Cal. Br. p. 6, emphasis in original). No reference, record or otherwise, is offered. We have shown above that, quite to the contrary of this claim, the Commission has told this Court that it cannot "speculate as to facts that may exist twenty years or more in the future," and no reason has been offered why producers can necessarily do so. Also, the Third Circuit has found:

" . . . The motivation behind the periodic price adjustments [provided by 'flexible' and 'indefinite' price

arrangements] is recognition of the probabilities of normal price variation in gas during the long duration of the contract. *The principle makes sense against any contrary view that might be urged.* Particularly is it desirable as compared to an attempt to state rigid price figures for the whole future twenty-five year operation." *Shell Oil Co. v. Federal Power Commission*, 292 F. 2d 149, at 152 cert. denied, 368 U.S. 915.

This Court viewed the advantage of the *totally* indefinite "Memphis clause" in the following manner:

"... Business reality *demands* that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; ..." *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, at 113.

As also noted earlier, contrary to the California position (Cal. Br., p. 7), flexible price clauses are fully consistent with the Commission's area approach since producers should not be deprived of the right to file for and receive the "fair price for the gas itself" which we are promised will emanate from such a proceeding.

California's second argument (Cal. Br., pp. 7-9) has been fully answered above wherein it has been shown that increases under the "forbidden" clauses are not automatic as California asserts; that the alleged contract disputes are not numerous, are not eliminated by the regulations, and need not drag out as occurred in one isolated situation; and that no additional test is needed of the Phillips' spiral clauses, 24 F.P.C. at 577, because the merits can be, and in that particular case were, decided before the "contract right" to all or some portion of the increase was settled — all without undue confusion.

California, too, argues (Cal. Br., pp. 9-10) that the price increases authorized by the so-called indefinite pricing clause necessarily "generate rate increase filings which have no relationship to the requirements of the company seeking the increase." It is further asserted that "a duty is placed upon the regulated producer to ask for rates it can justify on the basis of the proved requirements of the company." It is important to note first of all that California's demand is never made more specific than some vague reference to "requirements" and for ten years (since this Court's 1954 decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672), regulated producers have sought to fathom what quantum of proof, what requirements, are needed to support increases, *however arising in their contracts*. It would be a most startling turn of events if producers were now to be denied the right to "resort to the filing provisions of § 4(d) of the Act" on the grounds their filings don't meet their "requirements" when the regulated companies and this Court are still awaiting "the ultimate solution" to the question of what is the requirement. *Wisconsin v. Federal Power Commission*, 373 U.S. 294 at 304, 310.

Of course, since California gives absolutely no dimension to its "requirements" criterion there is no basis to judge why the "fortuitous event" of five years passing between fixed escalations more nearly guarantees that these nebulous and ephemeral "requirements" will be met than does the "fortuitous event" that ten or fifteen years have passed and the parties are to renegotiate—taking full cognizance of the sales conditions at the time of the renegotiation (R. 52).

One remaining point should be emphasized. In 1957, the Commission set Texaco for a formal hearing on a number of increased rates, some of which arose from so-called

indefinite escalation clauses. Drawing on the evidence, the examiner ruled (on the basis of the cost-of-service test which California has argued to this court is the proper test, *Wisconsin v. Federal Power Commission*, 373 U.S. 294 at 308) that Texaco should be discharged from any obligation to make refunds since it had shown its economic need for the increased rates. *Texaco Inc.*, Docket Nos. G-8969, *et al.*, decision of January 23, 1963.⁵

This Appendix has been included because Petitioner, now joined by California, continues to assert the truth of "alleged findings" not of record and to assert points which we have never been permitted to cross-examine or rebut. We, thus, were compelled to include this showing of the clear lack of probable validity of these so-called "findings" lest our silence be interpreted as agreement.

⁵ The twenty-two contracts in this proceeding were eventually considered along with some one hundred-fifty other Texaco gas sales contracts in general settlement discussions which led to a proposal approved by Commission order of December 30, 1963.

APPENDIX B**FEDERAL POWER COMMISSION
Washington 25**

**Docket No. CI63-576
The Atlantic Refining Company**

May 31, 1963

**The Atlantic Refining Company
P. O. Box 2819,
Dallas 21, Texas**

Attention: Mr. Edward J. Kremer, Jr., Attorney

Gentlemen:

This is with reference to the resubmission of your application, filed in Docket No. CI63-576 on February 11, 1963, and the related contract dated July 30, 1962, with Montana-Dakota Utilities Company covering a sale of gas from acreage in the Riverton Dome Field, Fremont County, Wyoming.

Atlantic's original application filed in this docket on October 30, 1962, was rejected by the Commission because the related July 30, 1962, contract with Montana-Dakota contains pricing provisions other than those permitted by Section 154.93 of the Commission's regulations under the Natural Gas Act. In this resubmittal of that application and contract Atlantic has not deleted the proscribed pricing provisions (Sections 10.5 and 10.6 of Article X of the contract), but has instead amended the contract to provide that the said provisions are declared to be inoperative and of no force and effect so long as they are lawfully forbidden as pricing provisions in contracts filed with the Commission as rate schedules.

This amendment does not meet the requirements of the regulation. Section 154.93 itself sets forth that the prescribed pricing provisions "• • • shall be inoperative and of no effect at law" and further requires that any contract executed after April 2, 1962, containing such provisions shall be rejected. Therefore, it is apparent that the prescribed provisions, even though of no effect at law, cannot be contained in contracts filed with the Commission.

In addition, the Commission has granted in this docket the application of Atlantic for rehearing on the rejection of the original application in order to consider whether or not Section 154.93 should be amended or modified to permit pricing provisions like those contained in Atlantic's contract with Montana-Dakota and, consequently, any further action in this docket should more than likely await the Commission's determination of that issue.

Very truly yours,

J. H. GUTHRIE
Secretary

Copy to:

Mr. Bernard A. Foster, Jr.
Ross, Marsh & Foster
725 Fifteenth Street, N. W.
Washington 5, D. C.

Montana-Dakota Utilities Co.
831 Second Avenue South
Minneapolis 2, Minnesota

APPENDIX C

The Administrative Procedure Act, 60 Stat. 238; 5 U.S.C. 1001, *et seq.*, provides, *inter alia*, as follows:

SEC. 2. As used in this Act —

• • •

(c) **RULE AND RULE MAKING.** — “Rule” means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. “Rule making” means agency process for the formulation, amendment, or repeal of a rule.

(d) **ORDER AND ADJUDICATION.** — “Order” means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. “Adjudication” means agency process for the formulation of an order.

(e) **LICENSE AND LICENSING.** — “License” includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. “Licensing” includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

• • •

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representative —

(a) NOTICE — Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE — The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with Sections 7 and 8.

(c) SEPARATION OF FUNCTIONS — The same officers who preside at the reception of evidence pursuant to section 7

shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) **DECLARATORY ORDERS** — The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

• • •

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section —

(a) **PRESIDING OFFICERS.** — There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency; or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part

by or before boards of other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) **HEARING POWERS** — Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) **EVIDENCE** — Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record, or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative, and substantial evidence. Every party shall have the right to present his case or defense by oral

or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) **RECORD.** — The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7 —

(a) **ACTION BY SUBORDINATES.** — In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues

upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS. — Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT
PAN AMERICAN PETROLEUM CORPORATION

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March, 1964

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT
PAN AMERICAN PETROLEUM CORPORATION

OPINION BELOW

The opinion of the Court of Appeals (R. 104-121) is reported at 317 F. 2d 796.

JURISDICTION

The judgment of the Court of Appeals setting aside the Commission's orders and remanding the proceedings was entered on May 20, 1963 (R. 122). The petition for writ of certiorari was filed on August 19, 1963, and granted on November 12, 1963 (R. 123). The

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jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).¹

QUESTIONS PRESENTED

Whether the Natural Gas Act, the Administrative Procedure Act, and constitutional requirements of due process in rate regulation permit the Federal Power Commission

(1) to "proscribe" contract pricing clauses controlling rights to file rates, and to maintain "reasonable" rates, in advance of hearings and findings under Section 7 of the Natural Gas Act, in advance of hearings under Sections 4 and 5 of that Act, and without testing of such clauses and making findings under the substantive "just and reasonable" standards of Sections 4 and 5 of the Natural Gas Act; and

¹ Respondent Pan American Petroleum Corporation's position on jurisdiction is that under Section 19(b), the appropriate vehicle for judicial review of orders promulgating "rules" is a petition for review upon the record in the "rule-making" proceeding (see R. 112-114 and *Pan American Petroleum Corporation v. Federal Power Commission*, No. 387, This Term, petition for writ of certiorari pending). Where a court undertakes review of a "rule" in reviewing a "special" order applying the "rule," Section 19(b) then (1) limits review to determination of whether the "rule" conflicts with procedural and substantive requirements of the Act, and (2) prohibits review of "reasonableness" or other issues requiring reference to alleged factual support of the "rule," unless the record in the underlying rule-making proceeding is certified to the court in compliance with Section 19(b) and 72 Stat. 941 (1958), 28 U.S.C. § 2112. Respondent does not agree with Commission arguments that a court may proceed to determine "reasonableness" of a "rule" in the absence of certification to that court of the record in the "rule-making" proceeding (*cf.* § 19(b) of the Natural Gas Act; 28 U.S.C. § 2112; and *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601, 619-621 (9th Cir. 1963), petition for writ of certiorari pending, No. 684, This Term).

(2) to remove the subjects of pricing and rate-changing clauses, economic justification thereof, and future rates, from the hearing and substantive requirements of Sections 4, 5, and 7 of the Natural Gas Act and procedural requirements of Sections 5 and 7 of the Administrative Procedure Act, and to "prescribe" such clauses through summary "rule-making" under Section 16 of the Natural Gas Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w, and of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011, are set forth in the Appendix, *infra*, pp. 59-72. Commission orders in issue, amending regulations under the Natural Gas Act by Order Nos. 232, 232-A, and 242 (18 C.F.R. (Cum. Supp. 1963)), appear at R. 12-17, 18-21, and 22-25.

STATEMENT

By letter (R. 89), the Federal Power Commission (Commission) rejected without hearing an application for a certificate of public convenience and necessity by Respondent Pan American Petroleum Corporation (Pan American) under Section 7 of the Natural Gas Act (R. 83-88), because Pan American's gas sales contract provides that in 1983, the twentieth year of deliveries, the parties may redetermine price. The Commission thereby applied its Order No. 242 (R. 22) which requires summary rejection of applications based on contracts containing pricing clauses prohibited by the Commission's earlier Order Nos. 232 and 232-A (R. 12). The court below held that such rejection and Order No. 242 are in conflict with hearing requirements and substantive standards of Sections 4,

5, and 7 of the Act, and that Order Nos. 232 and 232-A are valid as expressions of policy but not as determinative of rights in advance of hearings. The case requires initial reference to substantive content of Order Nos. 232, 232-A, and 242.

The basic regulations—Subsequent to *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954), the Commission issued regulations to provide for gas producers' filing of applications for certificates under Section 7 (18 C.F.R. §§ 157.23-157.31), and of rate schedules under Section 4 (18 C.F.R. §§ 154.91-154.102). These regulations defined "rate schedules" as sales contracts in force or subsequently executed (18 C.F.R. § 154.93), required filing of such contracts as exhibits to applications under Section 7 (18 C.F.R. §§ 157.23-157.31), and specified manner for filing notices of changes of rates under Section 4(d) (18 C.F.R. § 154.94).²

At that time, the Commission did not construe the Act to mean that the right to file rate changes was limited by contract clauses, but held that rates could be established by unilateral tender under Section 4(d) and Commission acceptance.³ However, in 1956 in

² Petitions for review of these regulations issued in 1954 were dismissed on grounds that they were procedural and that questions of substance would be decided through hearings under Sections 7 and 4 (see *Amerada Petroleum Corp. v. Federal Power Commission*, 231 F. 2d 461 (10th Cir. 1956); *Magnolia Petroleum Co. v. Federal Power Commission*, 236 F. 2d 785 (5th Cir. 1956), cert. den., 352 U.S. 968 (1957)).

³ Commission construction as to pipeline agreements is discussed in *Mobile Gas Service Corp. v. Federal Power Commission*, 215 F. 2d 883, 885 (3rd Cir. 1954), and as to producer contracts in *Natural Gas Pipeline Co. of America v. Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958).

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, this Court held that the right to file a rate or change of rate under Section 4(d) is limited by provisions of a contract filed as a "rate schedule," and that such contracts are subject to Commission modification only after hearings and findings of "unreasonableness" under standards of the Act (350 U.S. at 341, 343, 347). Thereafter, the Act was held to mean (1) that a producer may file under Section 4(d) *only* when the specific rate is authorized by clauses of the contract on file as the "rate schedule," and (2) that where such a contract right exists, the Commission may not reject the rate change, but must accept it for filing, *subject always* to Commission powers to suspend under Section 4(e) and to disallow the rate or any part thereof upon a finding as to "reasonableness." Cf. *Cities Service Gas Co. v. Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. den. sub nom.*, *Magnolia Petroleum Co. v. United States*, 358 U.S. 837 (1958), and *Warren Petroleum Corp. v. Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960).

After *Mobile*, the Commission initiated steps to limit flexible pricing provisions in producers' contracts and rights thereunder to file rates under Section 4. In 1956, the Commission recommended legislation to provide for elimination of clauses permitting rate changes by reference to (1) prices received by a purchaser and price indices, or (2) prices paid or offered to other sellers in a field or area (36th FPC Annual Report to Congress, pp. 17-19 (1956)), and for the next four years sought similar amendments of the Act, but with-

out success.⁴ Accordingly, until 1961, the *Mobile* construction was applied to mean that flexible clauses were unabrogated by the Act, and producers had the right to file rates based thereon and obtain hearings prior to Commission action modifying contracts or disallowing rates.⁵

Commission Order Nos. 232 and 232-A. The Commission's second effort to prohibit certain clauses produced the orders in issue. On April 4, 1956, the Commission issued notice of a proposed regulation relating to two types of clauses only—those requiring reference to purchasers' resale rates and pricing indices, or to other prices paid in the field (21 Fed. Reg. 2388). However, no action was taken for five years until on March 3, 1961, the Commission issued its Order No. 232 (R. 12-17). The Commission thereby amended Section 154.91 of the Regulations to provide that effective April 3, 1961, any provisions in contracts tendered on and after April 3, 1961, containing clauses *other than* "definite" escalations in a "specific amount" at

⁴ 37th FPC Annual Report, pp. 17-18, 25-26 (1957); 38th FPC Annual Report, pp. 15-16 (1958); 39th FPC Annual Report, pp. 12-13, 18-19 (1959); and 40th FPC Annual Report, pp. 15-17 (1960). Here, the Commission offers definitions of clauses it terms "spiral escalation," "favored nations," and "indefinite pricing" clauses. Since the underlying principle is that of "flexible forward pricing," such clauses have been more accurately described as "flexible pricing clauses" in general (see R. 19). Where a specific clause is discussed, accuracy requires reference to the *definite* economic facts specified as determinant of price, rather than erroneous, loose terms such as "spiral" or "indefinite."

⁵ See, e.g., *Bel Oil Corp. v. Federal Power Commission*, 255 F. 2d 548, 554 (5th Cir. 1958), *cert. den.*, 359 U.S. 804 (1958); *Phillips Petroleum Co. v. Federal Power Commission*, 258 F. 2d 906, 908 (10th Cir. 1958); *Cities Service Gas Producing Co. v. Federal Power Commission*, 233 F. 2d 726, 727 (10th Cir. 1956).

"definite dates" or for reimbursement of "changes in production, severance or gathering" taxes, "shall be inoperative and of no effect at law" (R. 14). The order allowed but 17 days for "comments" and made reference to a decision issued the same day in *Re Pure Oil Company*, 25 FPC 383 (R. 13).

As pointed out by a commissioner dissenting in part, this order "outlawed" not only the two types of clauses specified in the original notice (so-called "spiral" and "favored nation" clauses), but all redetermination, renegotiation, and arbitration clauses (R. 15-16). As revealed by the same commissioner, as to the latter types, the Commission had "never had a hearing on whether such provisions are contrary to the public interest" (R. 16), and had "never published notice of any intention to adopt such a rule . . ." (R. 17).⁶

Within the 17 days permitted, "comments" were filed (R. 18), but such documents filed by proponents or opponents of a "rule" are not served upon other

⁶ In this respect, the *Pure Oil Company* proceeding cited by the majority involved a single producer, and commenced on February 27, 1959, only to resolve disputed interpretation of a contract. The Commission on May 12, 1959, added as an "additional issue" only the question of whether this so-called "favored nation" clause was "void or voidable as contrary to the public interest." The Commission ultimately decided (1) the interpretation question adversely to Pure, and (2) the clause was "contrary to the public interest," but legal and regulatory considerations precluded a declaration that such a clause in an existing contract is void (25 FPC at 387-389). The Commission itself noted that "the record" was made "with special reference to Pure's two party provisions . . ." (25 FPC at 388).

On review, the contract interpretation was affirmed only in part upon grounds set forth by the Commission, but the issue of a "void" clause or Commission dicta on this subject were neither considered nor discussed by the court. See *Pure Oil Co. v. Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962).

persons (cf. 18 C.F.R. § 1.17). Eleven days later on March 31, 1961, the Commission amended its order (R. 18-21) but modified the regulations only (1) to provide permissible "redetermination" of prices once in any five-year period for which there is no specific, fixed escalation, and only by reference to rates for other sales "in the area of the price in question," "subject to the jurisdiction of the Commission," and "not in issue in suspension or certificate proceedings." (R. 20-21); and (2) to provide that Order No. 232 applied to contracts executed after April 3, 1961³ (R. 20).

Petitions for review of these orders upon the record in the "rule-making" proceeding were dismissed upon Commission insistence that review of such "general" orders is not permitted (with one court stating that when the orders were applied to disallow a particular provision, validity of the orders then could be tested (*Sun Oil Company v. Federal Power Commission*, 304 F. 2d 293, 294 (5th Cir. 1962))). The courts also dismissed petitions seeking review of specific orders accepting contracts with "proscribed" clauses but stating such clauses are "of no effect at law" (*Sun Oil Company v. Federal Power Commission*, 304 F. 2d 290, 292-293 (5th Cir. 1962)).

Between April 3, 1961, and April 2, 1962, there thus was no review of Order Nos. 232 and 232-A. The Commission continued to accept contracts containing "proscribed" clauses, but subject to testing of validity of its orders in future hearings under Sections 7, 4, or 5.

Commission Order No. 242. On October 10, 1961, the Commission issued notice of another proposed amendment to the regulations to provide for (1) rejection without hearing of producers' "rate schedules"

if the contract contained clauses other than those "prescribed" by Order No. 232-A (Section 154.93 of the Regulations, R. 25); (2) rejection without hearing of producers' applications for certificates if the contract in support contained clauses other than those so prescribed in Order No. 232-A (Section 157.25 of the Regulations, R. 25); and (3) no "consideration" of such producer contracts in determining adequacy of a pipeline's contracted gas supply in pipeline proceedings under Section 7 (Section 157.14(a)(10) of the Regulations, R. 25). Again, "comments" were permitted, but by Order No. 242 the Commission so amended the regulations, effective April 2, 1962, and applicable to contracts executed after that date (R. 22-25).

The rejection order. On October 4, 1962, Pan American executed a contract covering sale to a pipeline of gas to be produced from the Beaver Creek Field, Wind River Basin, Wyoming (R. 87). The term extends for 20 years "and so long thereafter as gas is capable of being produced in commercial quantities" from Pan American's leases (R. 88). Pricing clauses provide (1) for a one-cent escalation in 1968, 1973, and 1978, and (2) in each five-year period commencing October 1, 1983, for a "fair market price" redetermined by the parties by reference to quality, quantity, delivery pressure, delivery point, "other relevant factors," and prices then being paid in the general area under agreements recently negotiated or renegotiated, but in no event for less than 20.5 cents per thousand cubic feet (R. 87-88).

On January 16, 1963, Pan American applied under Section 7 for a certificate for this sale (R. 83-86), but by letter, the Commission rejected the application on the ground that the pricing clauses are not "permitted" under Order Nos. 232-A and 242 (R. 89-90).

Rehearing was denied (R. 91-98, 99-100), and Pan American then filed the petition docketed as Case No. 7303 below (R. 74-82).

The decision below. Seven cases were decided (R. 104-121):

(a) In Case Nos. 6947, 6973, and 7135, review was sought of orders accepting other contracts containing "proscribed" clauses, but stating that such clauses are "of no effect in law" (R. 114-115); upon Commission motions, the court dismissed, stating that these orders do not presently "aggrieve," but this "conclusion does not mean that Order Nos. 232, 232-A, and 242 are valid" (R. 116).

(b) In Case Nos. 7002 and 7179, review of Order No. 242 was sought upon the record in the rule-making proceeding (R. 108, 112); again, the Commission moved to dismiss arguing that the Act vests no jurisdiction in the courts for direct review of "a rule of general applicability" (R. 112); the court treated this as an argument as to "aggrievement," held the "controlling point" in cases construing Section 19(b) has been that "a person is not aggrieved by a general order," and dismissed the two cases (R. 113-114).⁷

⁷ Here, in Case No. 387, This Term (petition for writ of certiorari pending), Pan American seeks review of dismissal of its petition seeking review of Order No. 242 upon the record in the rule-making proceeding. The Commission opposes such review, but here seeks to rely upon the record in such cases. In this respect, Pan American objects to the Commission's "lodging" with the Clerk of this Court documents taken from the records of "rule-making" proceedings before the Commission which were *not* included in the record certified to the court below in the instant cases, and which are *not* part of the record before this Court in this case. See *Lawn v. United States*, 355 U.S. 339, 354 (1958); *McClellan v. Carland*, 217 U.S. 268 (1910), and Brief for the Commission, p. 7, fn. 6, and p. 29, fn. 30.

(c) In Case Nos. 7303 and 7217, Pan American and Texaco Inc., sought review of separate orders rejecting applications based on contracts containing clauses "proscribed" by Order Nos. 232, 232-A, and 242 (R. 116); on the merits, the court held that Order No. 242, requiring rejection without hearing, is "void"; Order Nos. 232 and 232-A are "declarations" of "policy" which cannot, without hearings, invalidate pricing clauses retroactively or prospectively; and the orders rejecting applications without hearings must be set aside (R. 121).

In so holding, the court first noted that combination of the Commission position that its "general" orders are not directly reviewable and summary rejection of applications deprives a court of a record for "effective" review of "the basic question of propriety" of prohibited clauses (R. 117). The court recognized that Section 16 of the Act authorizes issuance of rules not in conflict with the Act, but found that here the Commission had acted not only without hearings required by Sections 7, 4, and 5, but also without application of, or prerequisite findings under, the controlling substantive standards of "public convenience and necessity" under Section 7 and "just and reasonable" under Sections 4 and 5 (R. 117-119). The court concluded that the orders are not permissible "interstitial legislation," and are in conflict with the relationship between contracting by regulated companies and Commission review powers established by the Act, particularly as construed in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956):

"Contracts establishing such rates and charges and providing for changes therein may be modified by the Commission only after hearing and

then only by the application of the standards of 'just and reasonable' and 'public convenience and necessity.' The summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review." (R. 120-121)

SUMMARY OF ARGUMENT

For the regulated producer, access to reasonable rates under long-term contracts is fixed initially by contract clauses. These clauses control opportunity to file and prove need for rates under Section 4 of the Natural Gas Act. Specific types of clauses discussed by the Commission, or even the 1983 "redetermination" clause involved here, may or may not be perfect in operation, but the questions now are *how* and upon what *facts* the Commission may "prohibit" and "prescribe" clauses consistent with the Act's standards. The court below correctly holds that because of the subject and specificity of the Act, summary "rule-making" cannot suffice for these decisions when combined with rejection of filings without hearing. These rules thus must be measured first by what is the substance of these Commission acts, and then by what processes *can* result in lawful orders which fix clauses controlling rates. So assessed, these rules cannot stand.

I. By "prescribing" clauses before filing and its review of controlling economic facts under the Act's standards, the Commission attempts to exercise substantive powers it does not have. Commission powers are limited to modification only *after* its review of contracts negotiated in the first instance by a regulated company. *United Gas Pipe Line Co. v. Mobile Gas*

Service Corp., 350 U.S. 332, 341 (1956). A major purpose of Commission review is to find facts controlling decisions as to whether an existing or "prescribed" clause affords the regulated seller required access to Section 4 for maintenance of "reasonable" rates. Commission action can only be after review of such facts as to sales, sellers, markets, and economic projections—not by advance "rule" and rejection.

Under Section 7, the Commission cannot decide whether "public convenience and necessity" permits a sale without scrutiny of contracts, "rate structure," and economic feasibility; clauses consistent with this standard cannot be devised by advance "rule." Cf. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959); *Wisconsin v. Federal Power Commission*, 292 F. 2d 753 (D.C. Cir. 1961). Further, source of Commission power finally to determine "reasonableness" of a clause or to order modification is Section 5(a), and the Section 5(a) standard also cannot be applied, consistent with substantive statutory and constitutional requirements in rate regulation, unless findings are made of existent facts as to sellers, revenues, economic requirements, and projections for the future. Advance proscription of clauses forever bars Commission review of all such facts and precludes findings prerequisite to so applying the Act's standards. Inherent failure of this advance "rule" and rejection method is exemplified by clauses now "prescribed"—the Commission thereby not only destroys rights to write contracts and obtain agency review, but also bars maintenance of "reasonable" rates which flexible clauses may permit.

The Commission claims Sections 7, 4, and 5 are sources of "power" so exercised, but has acted without

applying standards of those sections. Order Nos. 232, 232-A and 242 do not mention the standards, and contain neither findings nor references to economic facts to which these standards must be applied. The Commission thus not only improperly "outlaws" two types of clauses it considers unnecessary, but prohibits "re-determination" and other clauses as to which it has had no hearings, and imposes rigid substitutes by means precluding findings that clauses so imposed are consistent with Section 7, 4, and 5 standards.

II. Applying proper tests, the court below found Order Nos. 232 and 232-A valid as expressions of policy as to clauses only, and Order No. 242 void because it operates to bar required hearings and testing. Section 16 of the Act is not a source of power to so initiate contracts in advance, and summary processes it permits may not be used when Commission action therein precludes application of controlling standards. These rules so operate to fix allegedly "reasonable" clauses; however, nature of these subjects, underlying current economic facts required to apply standards, and procedures essential to adduce a record of such facts, require adherence to Sections 7, 4, and 5 for Commission review and modification of clauses.

Cases such as *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), do not control. Among other reasons, fixing rate clauses involves the "just and reasonable" standard of rate regulation, and it thus is patent error to state that this Act and Communications Act provisions involved in *Storer* are not "significantly different." The rules here are not reconcilable with the Gas Act and its regulatory system, and prohibit hearings required for rate regulation consistent with the Gas Act, constitutional requirements, and

Sections 5, 7, and 8 of the Administrative Procedure Act. Defects in these actions also are not shielded by assertions that merely *because* the Commission proceeds by advance "rule," orders on these subjects can be cloaked with "presumptions" and no longer require economic fact-finding, specific application of standards, or hearings consistent with requirements for due process in rate regulation.

III. The Commission's methods operate to preclude "effective" judicial review, although opportunity for such review is a step required for consistency with due process. Under Section 19(b), where judicial review is upon a rejection letter, the "rule-making" record is *not* available, and beyond this, the Commission's advance "rule" and rejection method prevents development of a record upon which a court can determine whether, in fact, a clause has been tested upon facts prerequisite to application of Section 7 and Section 5(a) standards. "Trials" in "rule-making," "case-by-case," have not been required. The Commission may evolve policy and precedent as to clauses, and freely consider clauses in its customary consolidated Section 7 proceedings, and determine "reasonableness" in its Section 4 and 5 area-rate cases in progress. See *Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963). There, "spiral," "favored nations," and other clauses may be assessed, and the "redetermination" clause here and satisfactory substitutes also can be tested. What emerges than may be consistent with the Act's purposes and preservation of access to "reasonable" rates.

ARGUMENT

INTRODUCTION

This brief shows that the orders in question neither establish "interstitial" rules, nor supply "concreteness" consistent with procedures and substantive testing required by the Natural Gas Act, the Administrative Procedure Act, and the Fifth Amendment. However, at the outset the Commission states what it terms "background." Because of Commission actions, there is no record to provide necessary focus.⁸ Nevertheless it is obvious the Commission speaks narrowly of past difficulties, without reference to necessity for flexible pricing clauses in a regulated industry. The spectrum cannot be so narrowed—this issue is more critical than resolving disputed causes for fluctuating approaches of the past ten years (see *Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963)).

Contracts for twenty years or more are not producer oriented; such terms result from Commission requirements that purchasing pipelines maintain a long-term committed gas supply and from practicalities of financing pipeline construction.⁹ Of necessity, producers must provide for occurrences during the long term, including future drilling, workovers, buyer's market

⁸ See R. 112-114, and the Commission's "Brief in Opposition" on Petition for Writ of Certiorari in the companion case, No. 387, This Term (petition for writ of certiorari pending).

⁹ See discussion in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956); *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, 113-114 (1958); *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 361 U.S. 137, 155-156 (1960); and as to producers' needs in *Forest Oil Corp. v. Federal Power Commission*, 263 F. 2d 622, 625 (5th Cir. 1959).

fluctuations, pressure decline, tax increases, and price changes (R. 32, 35, 36, 43, 50, 53). Since economic prediction must be used, flexible pricing clauses are devised as "more sensible" than "an attempt to state rigid price figures for the whole future twenty five year operation." *Shell Oil Co. v. Federal Power Commission*, 292 F. 2d 149, 152 (3rd Cir. 1961), *cert. den.*, 368 U.S. 915 (1962). This requires writing protective clauses tied to future events reflecting then current economic and field conditions, *e.g.*, references to buyer's cost-fixed rates, price indices, and then current contracts (Pet. Br., p. 15, fn. 14). Under the 1963 contract here, reference thus will be made twenty years hence to economic facts such as then existing quality, pressure, etc., and then recently negotiated contracts (R. 87-88).

Regulation magnifies importance of flexible clauses; absent a contract authorization, a producer cannot file, obtain a hearing, and prove need for a given rate during the long term. See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Therefore, a combination of factors is involved—the long term imposed by regulatory and pipeline financing considerations; the producer's need for economic protection over this long period of delivery obligation; and the requirement for pricing clauses permitting filing and maintaining "just and reasonable" rates.

Doubtlessly, filings followed advent of producer regulation in 1954, and rate increases followed post-war growth and inflation, but existence of flexible pricing clauses has never been shown to be "the" cause of increase in Commission duties. Inevitably in the decade since 1954, producers had to make filings under Sec-

tion 4 and must do so in the future, but there is no support for claims that flexible clauses generate "hosts" of filings "unrelated" to "economic need." Where the Commission paused in its indecision over how to determine "reasonable" rates, producers have proved need by concrete evidence.¹⁰ In the same vein, flexible clauses have not impaired the Commission's ability to apply its "in-lineness" reading of the decision in *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959) (CATCO);¹¹ the courts have corrected the Commission view that "interpretation" of clauses involves vast studies or anything other than "ordinary principles" of contract law;¹² and the

¹⁰ See, e.g., *Re Christie, Mitchell & Mitchell*, 15 FPC 758 (1956); *Re Wunderlich Development Co.*, 15 FPC 690 (1956); *Re Gilling Oil Co.*, 20 FPC 770 (1958); *Re Pan American Petroleum Corporation, et al.*, 19 FPC 463 (1958); *Re Murphy Corp., et al.*, 25 FPC 334 (1961); *Re United Carbon Co., et al.*, 25 FPC 181 (1961); *Re Columbian Carbon Co.*, 25 FPC 365 (1961); *Re Phillips Petroleum Co.*, 24 FPC 537 (1960); *Re Sinclair Oil & Gas Co.*, 22 FPC 53 (1959).

¹¹ See, e.g., *California Oil Co., Western Div. v. Federal Power Commission*, 315 F. 2d 652 (10th Cir. 1963); *Atlantic Refining Co. v. Federal Power Commission*, 316 F. 2d 677 (D.C. Cir. 1963).

¹² See *Warren Petroleum Corp. v. Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960); *Pure Oil Company v. Federal Power Commission*, 299 F. 2d 370 (7th Cir. 1962); *Shell Oil Co. v. Federal Power Commission*, 292 F. 2d 149 (3rd Cir. 1961); cert. den., 368 U.S. 915 (1962); *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 268 (1960). In this respect, the "thirty-eight" cases involving difficulties of "interpretation" cited by the Commission's Brief (p. 18) were, with one exception, generated by one type of clause in substantially identical contracts with a single purchaser, El Paso Natural Gas Company. The exception is a case which involved an unusual Defense contract originated in 1943 (*Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960)).

courts further have indicated that interpretations may properly be in the courts initially, leaving only the issue of "reasonableness" of a contract rate for Commission determination.¹³

This is not to say the Commission has not had a decade of difficulties; it is to say that this history has never been shown to be traceable to existence of this or that clause, and that such is not a complete "background" to the critical question of "mechanism" of future control of producers' rates consistent with opportunity for reasonable, non-confiscatory rates under long-term contracts. The Commission considers it "in the public interest that long-term contracts be utilized" (R. 13), and recognizes "pricing flexibility" is necessary "to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts" (R. 19). The Act provides the "mechanism" for examination of these clauses under Section 7 in consolidated hearings today often involving scores of producers;¹⁴ and also provides Sections 4 and 5 under which "just and reasonable" rates and structures are being determined for hundreds

¹³ See *Pan American Petroleum Corp. v. Kansas Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962), *cert. den.*, 370 U.S. 937 (1962); *Pan American Petroleum Corp. v. Superior Court, et al.*, 366 U.S. 656 (1961).

¹⁴ *E.g., Re Sunray DX Oil Co., et al.*, Docket Nos. G-4281, *et al.*, May 28, 1963 (28 Fed. Reg. 5625); *Re Sun Oil Co., et al.*, Docket Nos. G-8592, *et al.*, August 6, 1963 (28 Fed. Reg. 8333); *Re Pan American Petroleum Corp., et al.*, Docket Nos. G-19417, *et al.*, December 12, 1963 (28 Fed. Reg. 13908); *Re Union Texas Petroleum, et al.*, Docket Nos. G-13221, *et al.*, December 31, 1962 (28 Fed. Reg. 192).

of producers in given areas upon a single record.¹⁵ The court below but curtailed an effort to dispose of issues of most importance under this statute without use of these "mechanisms" or development of intelligible records showing that clauses have, in fact, been tested under the Act's standards. These cases thus arise because producers seek access to the Act's processes for development of "the background" and fair appraisals of clauses, relevant economic facts, and requirements for reasonable rates.

I

THE REJECTION ORDER AND ORDER NO. 242 ARE IN CONFLICT WITH BOTH PROCEDURAL AND SUBSTANTIVE REQUIREMENTS OF SECTIONS 7, 4, AND 5 OF THE NATURAL GAS ACT

The Commission's first and perhaps most fundamental error is attempting to alter the regulatory system by changing the specific, defined relationship between contracting by regulated companies and Commission review of contracts. The beginning point for testing validity of such action is whether the statutory system permits the Commission, in advance of filing or testing of economic facts under the Act's standards; to write the contracts controlling rights to file rates for all time, and then reject a contract that differs even slightly. Order Nos. 232 and 232-A are the writing of such a contract in advance, and Order No. 242 so closes the Commission's doors.

¹⁵ *Area Rate Proceeding, et al.*, Docket Nos. AR61-1, *et al.* (24 FPC 1121 (1960)) (Permian Basin); *Area Rate Proceeding, et al.*, Docket Nos. AR61-2, *et al.* (25 FPC 942 (1961)) (Southern Louisiana); *Area Rate Proceedings, et al.*, Docket Nos. AR64-1 and AR64-2, *et al.*, November 27, 1963 (28 Fed. Reg. 12646) (Hugoton-Anadarko and Texas Gulf Coast).

A. Contract Clauses Cannot Be Written by the Commission in Advance and Can Be Modified Only After Testing Economic Facts Under the Act's Standards

1. The Commission has no substantive power to initiate clauses in advance of filing and review. In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the relationship between Commission powers and contracts was thoroughly explored. This Court held that the Act established a system under which Commission modification may occur only after contracts are written and reviewed, not before as the Commission attempts. In sum, the Act contemplates that rates may be set by individual contracts (350 U.S. at 338); "permits the relations between the parties to be established initially by contract" (350 U.S. at 339); and grants the Commission powers to modify a contract only *after* review in hearings and findings of "unreasonableness" under Sections 4 and 5 (350 U.S. at 341).¹⁶

Here, the Commission reverses this process. Without reference to sales, fields, market conditions, or sellers' circumstances, the Commission prescribes terms of contracts in advance. The Commission argument, as does the Ninth Circuit opinion relied upon,¹⁷ assumes existence of such authority, but the Tenth Circuit recognized that before a question of propriety of method of exercise of "power" is reached, the question of existence of such power must be answered. The

¹⁶ Applicability of this construction to producers is reflected by *Bel Oil Corp. v. Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958), and *Cities Service Gas Co. v. Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958).

¹⁷ *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601 (9th Cir. 1963).

only answer consistent with the Act is that given below—"Sections 4 and 5 relate to rates and charges and give the Commission power to modify contracts—not to make contracts" (R. 117). Powers to review and act after a contract is written are not authority to "review" and "modify" in advance.

The Commission avoids this question by first pointing to "substantive" powers to act *after* hearing and review, and then saying such powers may be exercised in advance and by "rule." Yet, the Act requires a step-by-step process. The court below thus looked first to the dichotomy of powers established by the Act, and found no substantive authority vested in the Commission to prescribe clauses of a sales contract in advance of filing and testing of economic facts under the Act's standards. The Commission still fails to reconcile such actions with the *Mobile* construction (Pet. Br., pp. 31, 32-38); it refers to such powers to modify a contract *after* review, but this leaves unanswered the question of source of authority to write clauses in advance, and then foreclose agency review, as Order Nos. 232, 232-A, and 242 do. The Commission simply has "made" a contract without substantive power and has done so in a manner no section of the Act permits.

2. The Commission also ignores the relationship of its review to the function of flexible clauses under the Act. In *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, et al.*, 358 U.S. 103, 113-114 (1958), this relationship as to pipeline was summarized:

"Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping

the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible. This concern was surely a proper one for Congress to take into account in framing its regulatory scheme for the natural gas industry, cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, . . . and we think it did so not only by preserving the 'integrity' of private contractual arrangements for the supply of natural gas, 350 U.S. at page 344 . . . (subject of course to any overriding authority of the Commission), but also providing in § 4 for the earliest effectuation of contractually authorized or otherwise permissible rate changes consistent with appropriate Commission review."

For producers, necessity for access to Section 4 of the Act is similar. See *Forest Oil Corporation v. Federal Power Commission*, 263 F. 2d 622, 625 (5th Cir. 1959). As does a pipeline, a producer must have a contract containing clauses to serve as the key to Section 4. As does a pipeline, the producer must negotiate an "individualized" contract for specific sales with clauses related to future economic changes. Clauses which a regulatory body may find "unreasonable" then may be written, but no regulatory body can make such a determination without examination of (1) the clause so negotiated for consistency with the statutory standard, (2) the clause the agency could impose as an alternative consistent with the same applicable standard, and (3) the contract and economic factors the agency must consider in so applying the standard to both clauses.

For these reasons, "appropriate Commission review" can only be in relation to contracts tailored by buyers and sellers, and only by Commission inquiry into relevant economic facts after the contract is so drawn and filed. Absent such review, the Commission does not know whether what it forbids is or is not consistent with sellers' requirements and the Act, or whether what it "prescribes" is consistent with the Act and also affords required access to Section 4 and "just and reasonable" rates. The controlling consideration thus is not that a so-called "spiral" or "favored nations" clause may be found unreasonable after review, but is that in advance of review of contracts and sellers' requirements, the Commission simply cannot exercise the function of review intended by Sections 7, 4, or 5.

3. Section 7 requires testing of facts under the "public convenience and necessity" standard in granting, denying, or "conditioning" an application. The Commission refers to application of this standard, factors applicable, and "conditions" it may impose after hearing (Pet. Br., pp. 33-38); but the Commission has embarked upon a course which precludes such application of the Section 7 standard.

As the "CATCO rule" of *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959), directs, the Commission must give careful scrutiny to producers' contracts under Section 7. If, after formal hearing, the initial rate is found inconsistent with the "public convenience and necessity" standard, a "condition" may be imposed to require interim reduction of that rate, pending filing and determination of "reasonableness" of that rate under

Section 4.¹⁸ As to other provisions, as the Commission says, Section 7 may require scrutiny, and such a hearing under Section 7 entails reference to "finances," "adequacy" of "reserves," "feasibility," and "characteristics of the rate structure" (Pet. Br., pp. 35-36); but, as to "rate structure" this Section 7 "scrutiny" does not extend to final determination of "just and reasonable" rates or clauses, nor permit "conditions" designed to bar access to "just and reasonable" rates under Section 4. To the contrary, scrutiny under the CATCO rule has a two-fold purpose the Act requires—interim consumer protection pending "full-blown" "reasonableness" determination under Section 4, and preservation of access to such a Section 4 hearing and findings therein consistent with criteria written into Section 4.

A "scrutiny" requiring consideration of all of these factors cannot be by imposing clauses permanently controlling "rate structure" in advance of testing. It thus is impossible to reconcile the Commission's claims. First, facts that must be considered under Section 7 are emphasized, but next the Court is told that the

¹⁸ The Commission imposes "conditions" on an *ex parte* basis in granting producers' temporary authorizations to make sales. The courts of appeals have held that even such a temporary "condition" must be specific and within bounds of due process, *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404, 408-409 (10th Cir. 1959); that such a "temporary" condition may not require permanent elimination of pricing provisions, *Sohio Petroleum Co. v. Federal Power Commission*, 298 F. 2d 465 (10th Cir. 1961); *Pan American Petroleum Corporation v. Federal Power Commission*, 298 F. 2d 478 (10th Cir. 1961); and that "conditions" so imposed on a temporary basis control only until such time as, after formal hearing under Section 7, the Commission issues a permanent certificate. See *Texaco Inc. v. Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961).

most fundamental components of a "rate structure"—clauses limiting the right to file under Section 4—need not be so examined upon the economic facts under Section 7, but may be handed out in a pre-cast form. No case cited by the Commission suggests such a course; to the contrary, each emphasizes the delicate nature of the task, after hearings under Section 7, of achieving a lawful "balance" between conflicting interests. The Section 7 standard, relating to "present" and "future," cannot be applied when the essential elements of a contract have been previously frozen in advance of required review. The Section 7 issue as to initial rate may not be so determined in advance by a "general" rule expressing "policy," *Wisconsin v. Federal Power Commission*, 292 F. 2d 753 (D.C. Cir. 1961); and remaining clauses of a contract likewise cannot be so prescribed if the Commission is to perform its duties under Section 7, and if access to "reasonable" rates under Section 4 is to be preserved.

4. Determination of "reasonableness" of clauses also requires fact-finding as to contracts, circumstances of sale, and sellers' economic requirements. In *CATCO*, the Court recognized that even a Section 7 "condition" requiring interim reduction of a rate must be followed by permissible filing under Section 4 and this required testing under the "reasonableness" standard. In *Mobile*, the proper forum and criteria for Commission action permanently modifying a contract clause also were said to be such rate hearings under Sections 4 or 5 and the "just and reasonable" standards. The Commission recognizes that the ultimate source of substantive power is this language of Section 5(a):

"Whenever the Commission, *after a hearing*, * * * shall find that any * * * contract affecting such rate, charge, or classification is *unjust, unreasonable*, unduly discriminatory, or preferential, the Commission shall *determine the just and reasonable* * * * contract to be thereafter observed and in force, and shall fix the same *by order* * * *"
(emphasis supplied)

Whether in "area-rate" cases or other cases, application of this standard to a contract or clause requires thorough examination of economic facts and producers' requirements for access to Section 4. Under a rate system resting upon long-term contracts, one set of clauses may not be "proscribed" and another "prescribed" without review of this relevant evidence as to projected revenue requirements, markets, and so on. These are the ingredients at the heart of "reasonableness" determinations in rate regulation, but the Commission argues that it may "exercise" "substantive" powers under Section 5(a) in a manner which by its nature bars Commission review of the very data by which "reasonableness" is determined. Without seller, contract, and circumstances of sale before it, the Commission assumes that it lawfully may determine one set of clauses to be "unreasonable" and another "reasonable" and impose the latter. But "reasonableness" cannot be so determined because prerequisite chronology is testing in relation to facts upon a record containing those facts required to apply this standard (*cf. Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963) and *Pet. Br.*, pp. 32-33). A "reasonable" rate cannot be fixed in advance by "rule," and the same is true of a "reasonable" clause.

Facts controlling a determination of whether the "present and future public convenience and necessity" are served by a sale of gas do not even exist until after a sale has been negotiated, and economic facts which must be adduced to determine whether a clause is not "reasonable" cannot be found until the seller and the contract are before the Commission. No matter how examined, Order Nos. 232 and 232-A thus are but an attempt to do the impossible—to write "conditions" upon certificates and to prescribe "reasonable" rate structures outside of Section 7, 4, and 5 processes. Order No. 242 then cuts off access to Sections 7, 4, or 5, after a contract is written. By their nature, such orders cannot rest upon "substantive" powers which can be exercised only after testing of specific facts against specific standards.

B. Prescription of Clauses in Advance Unlawfully Bars Access to "Just and Reasonable" Rates

The Commission bypasses the relationship between clauses and the requirement that "all" rates must be "just and reasonable" (Natural Gas Act, §4(a); *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)). A set of rigid clauses has been "prescribed" with no determination of whether those "prescribed" permit such maintenance of "reasonable" rates, and what the Commission imposes as permanent, absolute conditions to entry into interstate commerce, actually bars such access to the Act's standards. The "substantive" rights "impinged upon" thus not only are "rights to contract" initially, but also "rights" to sell

in interstate commerce at "just and reasonable" rates over the life of a long-term contract.¹⁹

All clauses limit the right to file,²⁰ but Section 4(a) permits a continuing "just and reasonable" rate for each sale. The moment a clause is written or modified by anyone, both contract and rights under the Act are affected—a producer may improvidently contract for less than a "reasonable" rate and have no complaint of an unlawful "imposition" by the Commission, but other questions arise when the Commission acts to prohibit a clause under which a "reasonable" rate *could* be filed and proved. Not the least is whether the substitute clause imposed precludes proof and establishment of "reasonable" rates, thereby erecting an unlawful bar upon entry into interstate commerce. Cf. *Standard Airlines v. Civil Aeronautics Board*, 177

¹⁹ The Ninth Circuit erred by treating this question as involving only a "constitutional right" to hearing in "rule-making" (322 F. 2d at 614-617). That court did not start with the basic issues of (1) whether the *selection* of subject matter for "rule-making" operates to deprive a company of an *otherwise* constitutionally guaranteed hearing, as is the case in rate regulation, and (2) whether the *substance* of the rules operates to deprive a company of rates measuring up to substantive, constitutional requirements in rate regulation which extend to producers. See *Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963).

²⁰ See *Episcopal Theological Seminary v. Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den. sub nom.*, *Pan American Petroleum Corp. v. Federal Power Commission*, 361 U.S. 895 (1959); *Bel Oil Corp. v. Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958); *Forest Oil Corp. v. Federal Power Commission*, 263 F. 2d 622 (5th Cir. 1959); *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 270 F. 2d 404 (10th Cir. 1959); *Sohio Petroleum Co. v. Federal Power Commission*, 298 F. 2d 465 (10th Cir. 1961); *Pan American Petroleum Corp. v. Federal Power Commission*, 298 F. 2d 478 (10th Cir. 1961).

F. 2d 18, 20 (D.C. Cir. 1949); *Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470 (1940).

By imposing the "conditions" of Order Nos. 232, 232-A, and 242, the Commission has so acted. Clauses imposed by the Commission permit but two ineffective choices for the long term:

(a) "Fixed" escalations which all recognize require guess-work, permit no flexibility tied to economic changes, and become progressively less reliable in proportion to projections for ten, fifteen, or twenty years from date of contracting (see, e.g., *Shell Oil Co. v. Federal Power Commission*, 292 F. 2d 149 (3rd Cir. 1961), *cert. den.*, 368 U.S. 915 (1962); and Commission position as to its own inability to make such long-range projections in considering contract term, *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137 (1960)); and

(b) "Redetermination" in relation only to other rates not "in issue" in rate or certificate proceedings before the Commission, which is in effect a freeze upon flexibility.

In operation, the latter clause provides no "reasonableness" protection. The rate this clause permits is *not* related to *then* current economic conditions or a producer's needs, but is related solely to prior *ex parte* determinations by the Commission itself. The key words in the clause are:

"... not in issue in certificate or suspension proceedings ..."

By *ex parte* "Statements of Policy" the Commission itself decides which rates are to be so placed "in issue," and such rates so remain "in issue" until pending proceedings as to those rates are concluded. See *Wiscon-*

sin v. Federal Power Commission, 292 F.2d 753 (D.C. Cir. 1961). Therefore, as the Commission's "clause" operates, a producer in Wyoming (1) must first ascertain what rates are "in issue" by search of the Commission's files in Washington; (2) then cannot file for a rate, regardless of economic conditions or needs, if by *ex parte* policy, the Commission already has placed all rates above that level "in issue" in *previously* pending cases; (3) must wait months or years until such prior cases are decided before he can file at or above that rate level; and (4) even then may file only a rate that has been previously fixed in these earlier proceedings without that producer or evidence as to his contract and requirements.

This is the illusion of "redetermination" allowed by the Commission. In contrast is the meaningful access to Section 4 intended by Congress to be available if the producer is to be permitted to maintain rates consistent with statutory and constitutional requirements. Thus, only by adherence to requirements of Section 5(a)—a finding that what is "proscribed" is unreasonable and that what is "prescribed" is reasonable—can the Commission permanently fix lawful clauses; and it is *because* of these very provisions of Sections 4 and 5 for responsible, of-record, determination of facts necessary to find "reasonableness," that this regulatory system satisfies constitutional requirements (*Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)).

A suggestion that a possibility of administrative "waiver" of "rules" can satisfy such requirements rests upon obscuring this critical economic, financial, and timing nature of the filing right in rate regulation. A "petition" addressed solely to discretion removes

the subject of clauses, timing, and rate filings from Section 4(d), the "reasonableness" standard, and testing both the Act and Constitution require. An effort to supplant Sections 4 and 5 with pre-cast rules, or a "petition" to nebulous "discretion," thus is both legal and practical error. Substantive requirements of this Act, and such procedures actually permitting application of the "reasonableness" standard in rate regulation, are among those cited by this Court as requiring "protection" against "erosion," even where "administrative and regulatory actions are under scrutiny." *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

C. The Commission Has Acted Without Applying the Controlling Statutory Standards

Aside from the foregoing, the court below found the Commission erred by attempting to "proscribe" clauses without actual application of standards of Sections 7, 4, and 5 (R. 119). This conclusion does not rest upon mere absence of words; rather, the court referred to Order Nos. 232, 232-A, and 242, and correctly found that none of the matters mentioned relates to the Act's standards; and that without proceedings under Sections 7, 4, or 5, no facts can be adduced to sustain findings under the statutory standards essential to support the actions taken.²¹

²¹ By contrast, the Ninth Circuit in *Superior* did not consider this question in relation to tests of whether, when an agency claims to have acted by application of statutory standards, the order reflects required findings, and the supporting record includes the facts that, as a matter of law, must be adduced before the specific statutory standard can be applied (cf. Section 19(b) of the Natural Gas Act). Under the Ninth Circuit's approach, an order purporting to determine a "just and reasonable" rate by "rule" could be sustained even though there are no findings and no record facts as to revenue requirements, etc., prerequisite to a "reasonableness" determination.

As to Section 7, neither order reflects an examination of the facts, ingredients, and factors always required for determining "public convenience and necessity" (e.g., as the Commission says, application of this standard requires reference to "rate questions," "rate structure," "financial set-up," economic "feasibility," etc. (Pet. Br., pp. 34-37)); but by these orders, and now relying upon Section 7 substantive authority, the Commission purports to decide which clauses will or will not satisfy, for all time, "present and future public convenience and necessity."

As to Sections 4 and 5, neither order refers to or reflects an examination of facts always prerequisite to determining whether an existing clause is "reasonable" or a clause "prescribed" instead is "reasonable" (e.g., the myriad economic facts, financial, trend and "area-rate" factors discussed in *Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963)); but now claiming to exercise Section 4 or 5 substantive authority, the Commission has purported to condemn one clause and prescribe another.

The Commission thus *has* attempted to "substitute its standards for the statutory standards" (R. 119). The Commission now urges that "language" need not be "parroted," and mention of "the public interest" suffices, but the Commission confuses an intended, ultimate "policy" result with the mechanics, findings, and standards the Act requires to produce orders and records showing that, in fact, such is the result reached.

Thus, in *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), the Court specifically held that "condition precedent" to exercise of power to modify a contract *was* application of the statutory standard and "a finding that the existing

rate is 'unjust, unreasonable, unduly discriminatory or preferential.' ". Similarly, *Mobile* emphasizes necessity for adherence to Section 5(a) and required findings thereunder; *CATCO* emphasizes necessity for actual examination of factual data, including rates, and for issuance of producer certificates *under* the standard of "public convenience and necessity" after evaluation of "all factors" bearing on "the public interest" (360 U.S. at 391); and in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), this *CATCO* language was both quoted and applied. This Court did not hold that mere recital of three words suffices for findings, facts, and conclusions required to apply the Act's standards. Obviously in both *CATCO* and *Mobile*, the Commission claimed that what it had done below was in "the public interest," but its acts were reversed, and for the reason that despite such avowals, its decisions did not reflect actual application of the controlling statutory standards.

Wisconsin v. Federal Power Commission, 373 U.S. 294 (1963), also does not support the Commission. Upon a comprehensive record under Sections 4 and 5, the Commission left clauses and rates standing, concluding data justified rates in issue. In view of extensive findings, factual support relevant to determining "reasonableness," and a record of "substance," termination of dockets was sustained; but nothing was said justifying orders purporting to apply Section 4 or 5 standards without a record, factual data, and findings prerequisite to an ultimate "reasonableness" determination and proscription of clauses.

Failure to consider and apply controlling standards is fatal regardless of a "form-of-proceeding" selected

by the Commission.²² When the Commission invokes Sections 7, 4, or 5 to "proscribe" clauses, its orders and records must reflect conscious application of the substantive standards and consideration of the economic facts prerequisite to their application. No record supports a claim that the substantive acts taken by Order Nos. 232, 232-A, and 242 were so entered or are so supported (*cf. National Broadcasting Co. v. United States*, 47 F. Supp. 940, 945 (D.C.S.D.N.Y. 1942), where the court found the agency based its action upon proper "theory" and made "specific findings" as to contracts).

Nothing said below even suggests that such application of standards must be "case-by-case" for each of "hundreds" of producers. This was merely Commission exaggeration below (R. 119), as here. The Commission has been left free to consider pricing clauses in its consolidated Section 7 proceedings to review specific pipeline projects and related initiation of producers' sales in new fields;²³ to consider in its

²² *Cf. United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), relied upon by the Commission. In formulating a rule, the Communications Commission was found to have considered and consciously applied the same substantive standard of "public interest, convenience and necessity" that also would have been prerequisite to a specific order on the same subject (351 U.S. at 195, fn. 1).

²³ See, e.g., *Re Natural Gas Pipeline Co. of America, et al.*, Docket Nos. CP62-243, *et al.*, November 30, 1962 (27 Fed. Reg. 12154) (34 producers); *Re Transwestern Pipeline Co., et al.*, Docket Nos. G-20464, *et al.*, July 30, 1963 (28 Fed. Reg. 8008) (19 producers); *Re Medina Gathering Corp., et al.*, Docket Nos. CP62-194, *et al.* (Opinion No. 397, July 16, 1963) (10 producers); *Re El Paso Natural Gas Co., et al.*, Docket Nos. G-17849, *et al.* (Opinion No. 390, June 19, 1963) (19 producers); *Re Michigan Wisconsin Pipe Line Co., et al.*, 27 FPC 449 (1962) (12 producers); *Re El Paso Natural Gas Co., et al.*, 23 FPC 369 (1960) (17 producers).

similar consolidated proceedings specific clauses customarily used or required in a given state or area because of local conditions or quality differentials, as the Commission is doing;²⁴ and to consider necessity for one clause or another in its consolidated Section 7 "area" proceedings which include all applications in areas as broad as all of Mississippi, South Louisiana or Central Oklahoma.²⁵ "Area-pricing" also is undisturbed, and the Commission is free to consider necessary clauses in these proceedings under Sections 4 and 5, in which all affected producers, state agencies, pipelines, royalty owners, and others can be heard, present evidence, and explore fully all factors and ramifications of final determinations of "reasonableness."²⁶ In sum, all "problems" cited by the Commission, including its internal administrative difficulties, can be solved under the Act's processes, but not by these "unauthorized short cuts." *Mississippi River Fuel Corporation v. Federal Power Commission*, 202 F. 2d 899, 903 (3rd Cir. 1953).

The holding below thus correctly pinpoints Commission errors of substance in attempting to initiate rate clauses in advance of agency review.

²⁴ See e.g. *Re Sunray DX Oil Co., et al.*, Docket Nos. G-4281, et al., May 28, 1963 (28 Fed. Reg. 5625) (121 producers).

²⁵ See e.g. *Re Sun Oil Co., et al.*, Docket Nos. G-8592, et al., August 6, 1963 (28 Fed. Reg. 8333) (17 producers); *Re Pan American Petroleum Corp., et al.*, Docket Nos. G-19417, et al., December 12, 1963 (28 Fed. Reg. 13908) (48 producers); *Re Union Texas Petroleum, et al.*, Docket Nos. G-13221, et al., December 31, 1962 (28 Fed. Reg. 192) (168 producers).

²⁶ See *Area Rate Proceeding, et al.*, Docket Nos. AR61-1, et al. (24 FPC 1121 (1960)) (Permian Basin); *Area Rate Proceeding, et al.*, Docket Nos. AR61-2, et al. (25 FPC 942 (1961)) (Southern Louisiana); *Area Rate Proceedings, et al.*, Docket Nos. AR64-1 and AR64-2, et al., November 27, 1963 (28 Fed. Reg. 12646 (1963)) (Hugoton-Anadarko and Texas Gulf Coast).

**THE COMMISSION HAS NOT EXERCISED RULE-MAKING
POWER LAWFULLY**

On the "form-of-proceeding" question, the Commission attack is wide of the mark. The specific holding is that Order No. 242 is an improper exercise of "rule-making" power, and that Order Nos. 232 and 232-A may stand as valid expressions of policy. All that is required is that "proscription" of clauses and "prescription" of alternatives be upon an intelligible record reflecting proper application of substantive tests the Act specifies.

**A. Tests for Validity of an Agency Rule Have Been
Applied Properly**

No novel tests of an agency rule have been applied. While the Commission still seems to believe the principal test is merely whether an agency had a "reasonable ground" for "exercise of judgment" (Pet. Br., p. 29), the court below correctly started with whether these rules have "statutory authorization," within the "bounds" of "administrative powers" (R. 117). These are the initial tests of validity, as "overstepping of boundaries" is an act in excess of power, *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 289-290 (1954); and an order which "... operates to carry out a rule out of harmony with the statute, is a mere nullity," *Manhattan General Electric Co. v. Commissioner*, 297 U.S. 129, 134-135 (1936).²⁷ Finding the rules so out of "harmony," the court correctly did not reach questions

²⁷ See also *Helvering v. Sabine Transport Company*, 318 U.S. 306, 311-312 (1943); *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 616 (1944); *Müller v. United States*, 294 U.S. 435, 444 (1935).

of "presumptions" that extra-record facts exist, or of "reasonable" exercise of a power already held not to exist.²⁸

The reasons an improper exercise of Section 16 rule-making power occurred can be succinctly stated—the regulatory system, particularly as construed in *Mobile*, vests no power in the Commission to "initiate" contracts prior to Commission review under the Act; exercise of substantive powers granted by Sections 7, 4, and 5 requires hearings prescribed and application of specific substantive standards to facts prior to final Commission action prescribing clauses; and orders which purport to exercise these substantive powers must rest upon proper factual support, required findings, and application of the Section 7, 4, and 5 standards. As to Section 16, the holding simply is that rules "to carry out" the Act cannot be "in conflict" with its substantive provisions (R. 117), and that Section 16 permits truly "interstitial" rules, but is not a source of power so to "legislate" in conflict with the Act. See *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508 (1949); *Willmut Gas & Oil Co. v. Federal Power Commission*, 294 F.2d 245, 250 (D.C. Cir. 1961); *cert. den.*, 368 U.S. 975 (1962). Legitimate use of Section 16 is unaffected.²⁹

²⁸ Absence of jurisdiction in the Ninth Circuit to proceed to the latter questions without a record in light of provisions of Section 19(b) of the Act and of prior certification of record to the Tenth Circuit, is discussed *infra*, pp. 54-56.

²⁹ Applying the same correct test, the Tenth Circuit thus has sustained rules issued under Section 16 which did not involve the over-reaching found here. See *Amerada Petroleum Corp. v. Federal Power Commission*, 231 F. 2d 461 (10th Cir. 1956); *Amerada Petroleum Corp. v. Federal Power Commission*, 293 F. 2d 572 (10th Cir. 1961), *cert. den.*, 368 U.S. 976 (1962); *Pan American Petroleum Corp. v. Federal Power Commission*, 268 F. 2d 827 (10th Cir. 1959).

Correctness of this testing is underscored by errors in the *Superior* decision upon which the Commission now relies. The Tenth Circuit correctly started with the substance of what these orders actually do—prescribe allegedly “reasonable” clauses controlling rates and access to “reasonable” rates—and examined the standards and procedures relevant and required when the agency performs such a function. In contrast, the Ninth Circuit in *Superior* at the outset ignored substance, and first “decided” there is no “constitutional hearing” requirement in “rule-making” (322 F.2d at 609), without regard for the principle that whether there is such a requirement is not so controlled at the outset by “form of proceeding” chosen, but is by the substance of what the deciding authority is actually doing.³⁰ In the same way, as to whether substantive authority vested under Sections 7, 4, and 5, and relating to rate-changing clauses, *actually can be* “exercised” through Section 16, the Ninth Circuit disposed of the issue by a series of academic propositions: (1) “rule-making” requires no of-record “evidentiary” hearing, (2) the Commission has substantive powers under Sections 7, 4, and 5, (3) that “hearings” are required under those sections does not bar issuance of rules under Section 16, and (4) therefore, orders of substance can be issued under Section 16.³¹ The most

³⁰ Cf. *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895 (1961): “... [c]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest affected by governmental action.”

³¹ The Ninth Circuit’s discussion of cases, even of those involving rate regulation, thus dealt with “procedural due process of law.” The effect of the rules in barring substantively “reasonable” rates was left aside.

significant, specific questions of substance thus disappeared in a series of assumptions, including the singularly incorrect "assumption" that despite their function in rate regulation, the rules here are no different from rules issued under the Communications Act which dealt with licensing.

The critical question thus passed over was decided correctly by the Tenth Circuit—in light of the *Mobile* construction, the subject matter, the statutory requirement for "reasonable" clauses for sales and sellers, and the agency's function and facts required when it acts on that subject matter, substantively valid orders on these subjects cannot be issued by summary "rule" in advance of hearings, testing of facts, and application of Section 7, 4, and 5 standards.

B. Existence of Rule-Making Power Does Not License Removal of the Subjects of Pricing Clauses and Future Rates From Required Procedures and Substantive Testing

The Commission claims its resort to summary process is supported by decisions affirming rules issued by other agencies. These decisions are not applicable, as this Commission does not have unlimited authority to remove the subjects of clauses and future rates from the of-record processes required by Sections 7, 4, and 5 of the Natural Gas Act, Sections 5 and 7 of the Administrative Procedure Act, and constitutional guarantees applicable to decisions upon rate questions.

1. *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956), a key to the Ninth Circuit's error, is not controlling. Legitimate "rule-making" always depends first upon what substantive acts an agency is performing, and a "rule" must be "reconcilable" with a statute "as a whole." In *Storer*, a rule dealing with

licenses for the privilege of entry into the public domain of the air-waves was involved (see *Federal Communications Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933)); but here the subject not only is the question of clauses at issuance of a certificate for sale of private property, the commodity natural gas, but also is the fixing of allegedly "just and reasonable" clauses controlling forever the seller's access to "reasonable" rates.³² The "broadcast" section of the statute involved in *Storer* neither prescribes control of "rates," nor establishes the structure, procedures, and standards applicable under statutes providing for rate control. See *Federal Communications Commission v. Sanders Brothers*, 309 U.S. 470, 474-475 (1940). Consequently, the "hearing" question in *Storer* did not extend to other "hearing" requirements having roots in constitutional requirements for both procedural and substantive due process under a standard requiring "reasonable" contracts and rates, as does the Natural Gas Act (*cf. Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942); *American Bond & Mortgage Co. v. United States*, 52 F.2d 318 (7th Cir. 1931), *cert. den.*, 285 U.S. 538 (1932)). Thus, if *Storer* were so controlling under the Gas Act, as the Commission argues, the "hearing" requirements considered so carefully in *Wisconsin v. Federal Power Commission*, 373 U.S. 294 (1963), could be eliminated, and all rates fixed without of-record hearings despite what the Act and the Constitution require. (See *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942); *Federal Power Commission v. Hope Natural Gas Co.*,

³² E.g., Pan American's contract here extends for the life of the leases covered thereby (R. 88).

320 U.S. 591 (1944).) An agency order attempting to do the same as to rate-fixing clauses likewise cannot be sustained. What was said in *Storer* as to a "hearing" requirement thus does not control, because of these basic distinctions in subject matter and agency actions involved.³²

Second, the fact that "procedures" described in *Storer* may be used does not validate a "rule" substantively. See *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954); *Functional Music, Inc. v. Federal Communications Commission*, 274 F.2d 543 (D.C. Cir. 1958), *cert. den. sub nom., United States v. Functional Music, Inc.*, 361 U.S. 813 (1959). In *Storer*, the rule was found "reconcilable with the statute" upon a record reflecting consideration of the applicable standard; the rule also was found to supply "concreteness" to a clearly expressed congressional direction to limit concentration of control of broadcast stations. Here, as found below, the rule runs directly counter to the Act's purpose, policy, and prescription of Commission powers over contracts, particularly as construed in *Mobile*. Under the applicable standards here (which were not applied), "concreteness" and "reasonable" clauses can be determined *only* when the regulated company is

³² While the "specific" order here is rejection of a certificate application, the substance of "general" orders requiring such rejection fixes finally and permanently "permissible" contracts and clauses controlling rates, a function the Commission can exercise only under its "rate-making" powers of Sections 4 and 5, and which the Commission here claims as source of "substantive" authority exercised in issuing the "general" orders. Thus, *CATCO* illustrates the point as to "licensing" under the Gas Act—use of interim conditions in "licensing" carefully drawn not to bar a "reasonableness" determination, is required because Sections 4 and 5 and application of the "just and reasonable" test are prerequisite to final permanent Commission action upon contract provisions controlling rates.

before the Commission with the economic facts absolutely prerequisite to lawful application of the "reasonableness" standard. In contrast, a "ceiling" consistent with a policy of limiting concentration of control could be validly fixed with or without facts as to whether Storer itself is permitted five, seven, or nine licenses. However, whether a rate-fixing clause is in the "public convenience and necessity," is "reasonable," and is essential to provide "reasonable" rates over the life of a contract cannot be decided without facts as to sales and affected companies being of-record *and found*—the Gas Act's standard of "reasonableness" envisions determinations which are "just and reasonable in their application to particular persons and companies." *Bowles v. Willingham*, 321 U.S. 503, 516-518 (1944).

Third, the "hearing" requirement as to "licensing" in *Storer* was not absolute and mandatory even for consideration of an application, and became mandatory only in the event of possible denial (see 351 U.S. at 195, fn. 5). By contrast, the Power Commission can neither consider, grant, condition, nor deny even an application under Sections 7(c) and (e) without a formal hearing;³⁴ and can never find a contract "unreasonable,"

³⁴ Thus, at page 34 of the "Brief for the Federal Power Commission" in *H. L. Hunt, et al. v. Federal Power Commission*, No. 273, This Term, the Power Commission correctly states as to Section 7 of the Gas Act: "The mandatory requirement of a hearing²⁷ guards against improvident grants." The Power Commission then points out: "²⁷ Compare, e.g., Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. (Supp. IV) § 309, which does not make a hearing a necessary prerequisite to the grant of a license." See also FPC Annual Reports to Congress (42nd FPC Ann. Rep. 16 (1962); 41st FPC Ann. Rep. 2 (1961); 40th FPC Ann. Rep. 18 (1960); 39th FPC Ann. Rep. 19-20 (1959); 38th FPC Ann. Rep. 16-17 (1958)), wherein the Commission has sought amendments eliminating "mandatory" hearing requirements in Section 7.

nor prescribe a "reasonable" substitute, unless it proceeds "after hearing" with explicit findings under Sections 4 and 5. The question of eliminating "of-record" hearings here thus involves mandatory requirements both in "licensing" and "rate-making."

Next, a "waiver" rule considered sufficiently "protective" in *Storer* does not exist here because of both legal and practical considerations. First, Order No. 242's two-pronged provisions bar consideration of a supply under a "tainted" contract in pipeline certificate proceedings; a pipeline thus cannot run the risk of signing such contracts and having its own expansion project collapse because the Commission will not "count" the producers' reserves in passing on adequacy of "committed" reserves; consequently, once Order No. 242 stands *fully* understood, it is obvious that producers can negotiate nothing upon which to seek "waiver." Second, if in the rare instance, as here at this genesis of Order No. 242, an otherwise acceptable contract runs afoul of obscurities in Order No. 232-A, the pipeline project proceeds on schedule *without* the "offending" producer, and the producer still will have nothing as to which "waiver" can be sought.³⁵ Third, the Commission cannot lawfully substitute a

³⁵ Thus the Colorado Interstate Gas Company's Wind River Basin, Wyoming, project, of which the Pan American contract here involved is intended to be a part, has already proceeded to formal hearing before the Commission under Section 7, but *without* Pan American because of rejection of its application. See 28 Fed. Reg. 8008 (1963). The Commission's "waiver" argument also overlooks the *time* factor; producers face drilling obligations, lease expirations, legal obligations to royalty owners, and drainage by sales by adjacent lessees. Prompt processing of applications is thus required, and these business compulsions do not permit awaiting the Commission's leisure in a "waiver" process.

"waiver" process addressed to "discretion" for requisite testing of a contract under Sections 7, 4, and 5 standards; under the Act, once the contract is executed, it must be reviewed thereunder and if it has "offensive" clauses, validity must be tested by the Act's known, specific standards, not under unwritten considerations for "waiver." Fourth, if a contract is written without "offensive" clauses, there is thereafter nothing which the Commission can "waive" in applying Sections 4 or 5 to such a sale, as not even the Commission can "waive" the controlling contract. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Accordingly, "waiver" as a substitute for "hearing" here is condemned by the principles that a right to a "hearing" means a "meaningful" hearing, and that petitions for "rehearing" and the like addressed to "discretion" are "too little" and "too late." *Gonzales v. United States*, 348 U.S. 407, 415 (1955).

The Commission thus errs, as did the Ninth Circuit, in considering the test of these rules to be passed with a statement that there is no "significant difference" between provisions of the Communications Act and the Natural Gas Act. That "procedures" outlined in *Storer* may have been used cannot breathe life into "ultra vires" clauses written in advance of hearing and required testing under Section 7, 4, and 5 standards.³⁶

³⁶ The Commission also cites other Communications Act cases in which various rules have been sustained or reversed (*Pet. Br.*, p. 25), and *American Trucking Associations, Inc. v. United States*, 344 U.S. 298 (1953). In the latter, truly "interstitial" ICC rules were found (a) within delegated authority and consistent with statutory provisions, and (b) not arbitrary and unreasonable. The ICC had held formal examiner's hearings, with some 80 witnesses,

2. The Commission also has violated requirements of the Administrative Procedure Act (APA). The question is not whether the Commission correctly complied with Section 4(b) of that Act (Pet. Br., p. 14), but is by what authority it was acting upon these subjects under Section 4(b).

Elemental propositions are involved. When the Commission decides substantively that "public convenience and necessity" will be served by one clause or another, it can only be exercising power under Section 7 of the Gas Act, which specifies both standard and a hearing. Under the APA, this is "licensing" (§ 2(e)), "adjudication," and issuance of an "order" (§ 2(d)). Since the Gas Act requires that such "adjudication" be on a record of "an agency hearing," Section 5 of the APA applies when the Commission exercises this function, and this requires "decision" "in conformity" with APA Sections 7 and 8. These two sections obviously require hearings, opportunity to present and rebut evidence, and findings and conclusions upon the record so adduced. The hearing requirement of Section 7 of the Gas Act is mandatory, and the APA therefore requires the Commission to proceed in accordance with Sections 5, 7, and 8 thereof. No absolute discretion is left for removal of the sub-

formal report, findings, and oral argument (344 U.S. at 307-308; *Lease and Interchange of Vehicles by Motor Carriers*, 51 M.C.C. 461 (1950)). The rules were sustained upon conclusions that no specific statutory provisions governed the subject matter, the practice affected did not directly control rates, and that affected persons were left with available remedies for rate relief. In contrast, here there has been no such extensive inquiry below; the subject matter was committed by Congress to specific procedures and standards; and once a contract clause is "fixed," it controls the rights to file rates throughout a long-term contract.

jects of "conditions" upon certificates from these applicable procedures, for summary disposition by a "rule" processed on unserved "comments" under Section 4(b) of the APA. See *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

In the same way, when the Commission exercises substantive powers under Sections 4 or 5 of the Gas Act to decide that one clause is "unreasonable" and another is "reasonable" (as it claims to have done), Section 4(b) of the APA does not apply. The Commission is thereby formulating a "rule," but of "particular applicability" under Section 2(c) of the APA. Sections 4 and 5 of the Gas Act require that such a "rule" issue only "after hearing" upon "findings," and Section 4(b) of the APA states:

"Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection."

Sections 7 and 8 of the APA then require hearing procedures, receipt of evidence, explicit findings, and of-record decisions which the Commission admittedly has not had before issuing "rules" proscribing and prescribing clauses. Section 4(b) of the APA simply was not intended to apply to proceedings deciding such rate matters under the Natural Gas Act. See H.R. Rep. 1980, 79th Cong., 2nd sess., p. 51, fn. 9 (Sen. Doc. 248, p. 285); see also *Wirtz v. Baldor Electric Co.*, F. 2d , (No. 17770, D.C. Cir., Dec. 31, 1963).

The implications of accepting the Commission's reading of the APA include just what "communications" could be permitted when Sections 5, 7, and 8 of

the APA are disregarded.³⁷ Procedures "useful" in true "ruling-making" have been thus described: "The administrator or staff member may talk over possible rules with selected parties, by telephone or in person, singly or in groups, by systematically and formally arranged conferences or interviews or in connection with fortuitous contacts occasioned by other business." 1 Davis, *Administrative Law Treatise* (1958), p. 363. Such activity would hardly be appropriate for determining whether a clause controlling rates satisfies the "public convenience and necessity" and is manifestly inappropriate for determining "reasonableness" of a clause controlling rates. Yet, once the "selection" to consign these matters to "rule-making" under Section 4(b) is made, this activity apparently would be permissible, while proper adherence to procedures the Gas Act and APA specify for the functions and subject matter, eliminates such possibilities.

3. "Rule-making" is also inappropriate to determine required "adjudicative" facts. Wholly apart from the APA, Commission decision that Pan American cannot use "redetermination" clauses is a decision requiring economic fact-finding both as to those clauses and as to prescribed alternatives. Under this statute, such a decision cannot be made by summary procedures "rule-making" permits, but must be considered and disposed of as Sections 7, 4, and 5 specifically require.

The Commission's response is two-fold: (1) no "constitutional right" to a hearing exists and only "legislative facts" are involved *because* it has selected "rule-making" as the vehicle for action; and (2) therefore, "presumptions" involved in "legislation" attach, and

³⁷ See "Staff Report to the Special Committee on Legislative Oversight of the Committee on Interstate and Foreign Commerce," 86th Cong., 2nd sess., pp. 82-83.

the facts, if any, underlying decisions are not relevant to review. The most pertinent questions, however, are whether the agency had authority to act by advance "rule" without "adjudicative" fact-finding, and whether its particular decisions can be sustained on the basis of its recitals. Below, it was correctly decided that the Act's requirements as to the subject must be followed, and "adjudicative" facts must be found.

Where "specialized problems" are so involved, "adjudication" procedure is not only desirable (*Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202 (1947)), but in this instance has been so specified by Congress *because* the issue of "reasonableness" requires fact-finding. The idea that an administrator or agency is free to use "any" of the methods of a "legislature," without opportunity for hearing, was labelled "unsound" long ago. See *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 197 (1933); *Londoner v. Denver*, 210 U.S. 373, 386 (1908). Whether viewed as a "rate" condition on a certificate or as an order fixing a "reasonable" contract, a Commission order finally prohibiting interstate sales except under specified rate-changing clauses must rest upon adjudication of disputed facts requiring an of-record hearing. Cf. *Morgan v. United States*, 298 U.S. 468, 480 (1936); *Jordan v. American Eagle Fire Insurance Co.*, 169 F.2d 281, 285 (D.C. Cir. 1948). The "basic principle" that such a hearing on "adjudicative" facts is essential is also fully applicable to "denying" licenses here. See 1 Davis, *Administrative Law Treatise* (1958), p. 493.

Order Nos. 232, 232-A, and 242 are not in accord with these principles, and Order No. 242 is then applied to bar access to Sections 7, 4, and 5, and to a determination of "reasonableness." Pan American is told that it

may not sell gas in interstate commerce because its contract has already been found "unreasonable" by a "rule" issued without finding of any of the economic facts actually necessary to determine "reasonableness" under the Act's standards; Pan American is next told that *because* such a "rule" was issued by "rule-making," regardless of its substantive content, a fact-finding hearing was not required; and Pan American is further told that it cannot question a "presumption" that those facts did exist, were found, and were considered.

The court below has correctly concluded that the existence of Section 16 is no such warrant for repeal of Sections 7, 4, and 5 of the Act.

III.

THE COMMISSION'S METHODS HAVE BARRED "EFFECTIVE" REVIEW OF "PROPRIETY" OF CONTRACT CLAUSES

The Commission's method was aptly termed a "bootstrap operation" (R. 117), but onus for absence of a proper record falls upon the Commission, not the court below.

A. Section 19(b) Requires That Any Order Proscribing Clauses Be Reviewed Upon the Record Reflecting Findings and Application of Statutory Standards

Section 19(b) of the Act requires a record for judicial review. The Commission's belated, suggested extra-record judicial cure for defects in the agency's own actions is not permitted by that section.²⁸ Section

²⁸ Here, the Commission first says the "administrative record" provides a basis for determining "rational foundation" of a rule (Pet. Br., p. 14); then says the courts "may review written views and comments" in the "rule-making record" (p. 28); and finally says a court may take "judicial notice" of such a record, or require the agency to produce it (p. 29). Compare this with the Commission's position below opposing review of these rules upon the "rule-making" record, and with Section 19(b), Appendix p.

19(b) also compels the conclusion that there is no proper record here for effective review of decisions as to "propriety" of a clause, or even for testing "reasonableness" of a "rule" in the sense the Commission uses this term.

1. The Tenth Circuit has but bared an effort to prescribe clauses by means precluding judicial scrutiny. The Commission first discussed "favored nations" clauses in the *Pure Oil Company* proceeding, but its statements there were never subjected to judicial testing (*Pure Oil Co. v. Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962)-). The Commission next issued Order Nos. 232 and 232-A "proscribing" all flexible clauses, but as to all clauses other than "favored nations," the Commission "never had a hearing on the issue of whether such provisions are contrary to the public interest" (R. 15, 16); and thereafter successfully opposed review upon the "record" in the Order No. 232 "proceeding" (Pet. Br., p. 9; fn. 8). The Commission next issued Order No. 242, embodying Order Nos. 232 and 232-A as criteria for rejection, and also successfully opposed direct review of Order No. 242 upon that "rule-making" record (R. 112-114).⁸⁹ Thereafter, it rejected applications without hearing (R. 89-90), and the certified record for judicial review of this action does not include the "rule-making" records (see R. 1-122).

⁸⁹ Pan American here seeks review of the question of direct review of Order No. 242 upon the record in the "rule-making" proceeding (*Pan American Petroleum Corporation v. Federal Power Commission*, No. 387, This Term, petition for writ of certiorari pending). The Commission opposes such review, despite the statements in its briefs in the instant cases. In the face of the Commission's position below and here in No. 387, it thus is inappropriate for the Commission to suggest that the court below should have taken "notice" of the "rule-making" record, even if Section 19(b) permitted such a process.

For review, the Commission thus leaves a court with its rejection letters and Orders Nos. 232, 232-A, and 242 as printed here (R. 12-17, 18-21, 22-25). The claim then is made that rejection results from conscious application of substantive powers under Sections 7, 4, and 5, but a blanket of "presumptions" is spread over the record leading up to rejection. Yet, these are but unsupported statements, unacceptable as bases for effective testing of validity of substance of an order. *Burlington Truck Lines, Inc., et al. v. United States, et al.*, 371 U.S. 156, 168-169 (1962). When Sections 7, 4, or 5 are applied, particularly to decide "reasonableness" of a given clause, at some point in the Act's administration there must be substantial evidence, findings, and a record reflecting actual application of controlling standards (*cf. Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 632-635 (1945); *City of Detroit v. Federal Power Commission*, 230 F.2d 810, 816-819 (D.C. Cir. 1955); *cert. den.*, 352 U.S. 829 (1956); *State Corporation Commission of Kansas v. Federal Power Commission*, 206 F.2d 690, 723 (8th Cir. 1953), *cert. den.*, 346 U.S. 922 (1954)). Thereafter, at some point, effective judicial review of a claim that existent power has been "appropriately" exercised compels reference to a factual record and findings required as prerequisites to so applying a statute. See *State of Florida v. United States*, 282 U.S. 194 (1931); *Eastern-Central Motor Carrier's Association v. United States*, 321 U.S. 194 (1944); *City of Yonkers v. United States*, 320 U.S. 685, 691-693 (1944).

2. Below, the court accepted Commission arguments to preclude "direct" review of "general" orders upon "rule-making" records (R. 112-114). This conclusion entails recognition that "indirect" review of "rules"

may involve indulgence of "presumptions," as the Commission says. Therefore, what the court has told the Commission is that its regulatory method of combining such claimed "presumptions" and "indirect" review with rejection without hearing, is a method that not only prevents required Commission testing of clauses under Sections 7, 4, and 5, but also precludes availability of a record. Section 19(b) requires for reviewing Commission action proscribing clauses. The ultimate question of substance vital to all parties is validity of various clauses, but under Commission methods, a court can never effectively review these basic, substantive issues under this Act.

Section 19(b) absolutely limits review to the "record upon which the order complained of was entered." See Appendix, p. 64, *infra*, and *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960). The record for Section 19(b) review of a rejection letter thus is limited to the "record" upon which the letter was "entered," and that is *all* that is certified under Section 19(b). The Commission says a "general" order then may be tested, but that the courts then must presume "existence of facts," and those attacking the rule have a "burden" to show there is no "reasonable ground" for "exercise of judgment" even though the record is so limited by Section 19(b). Under such a "system" of "regulation" and "review," "rule-making" obviously can operate to bar scrutiny of records alleged to have been developed in "rule-making" proceedings, and there can be *no* effective review of lawfulness of substantive acts determining "reasonableness" of clauses controlling rates. The Commission thus would erase the judicial review provision from the Act, although opportunity for review of Section 4 or

5 actions is one of the steps essential to constitutionally valid processes under this statute (see *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942)).

3. Section 19(b) also bars "notice" of contents of records in other proceedings or review of documents outside the record certified under Section 19(b) by the Commission itself as the "record upon which the order complained of" was entered.⁴⁰ Quite correctly, the court below did not violate this record requirement and required cessation of methods operating to immunize Section 4 and 5 actions from judicial review upon a record adduced as the Act requires.

B. The Tenth Circuit Properly Did Not Reach "Reasonableness" of the Rules, and the Ninth Circuit Was Without Jurisdiction to Determine Such Questions

The Tenth Circuit's decision as to validity of Order Nos. 232, 232-A, and 242 rests upon conclusions that as final determinations of lawfulness of clauses, these orders conflict with the Act. That court thus was not required to employ "presumptions" the Commission urges. However, in the *Superior* opinion relied upon by the Commission, the Ninth Circuit purported to find the rules "reasonable," but in so doing, acted without jurisdiction.

Section 19(b) and Section 2112 of Title 28 U.S.C. provide that once the record of a Commission proceeding is certified to one of the courts of appeals, that court acquires "exclusive jurisdiction" to review a Commission order. In Case No. 7002 below (R. 112), the record of the Order No. 242 "rule-making" pro-

⁴⁰ Cf. Section 19(b) of the Act, Appendix, p. 64; Petitioner's Brief, p. 7, fn. 6, and *Lawn v. United States*, 355 U.S. 339 (1958).

ceeding was certified to the Tenth Circuit; was so certified there throughout proceedings before the Ninth Circuit in *Superior*; and so remains under stay of mandate pending decision here in No. 387, This Term. Consequently, Ninth Circuit jurisdiction extended only to determination of validity of the rejection letter before it, and not to review of any questions as to Order No. 242 requiring reference to the Order No. 242 record. Throughout this litigation and today, because of prior certification, only the Tenth Circuit had and has jurisdiction to so review Order No. 242 as to "reasonableness" upon the "rule-making" record.⁴¹

This issue is now pertinent here because (1) the Commission seems to attack the Tenth Circuit's conclusions as to "effective" review after that court granted the Commission's own motion to dismiss petitions seeking direct review upon the "rule-making" record; and (2) the Commission cites the Ninth Circuit's action as correct review under Section 19(b) without a "rule-making" record. However, even in review of a "rule," a record is required under Section 19(b) if "reasonableness" of a "rule" is to be determined.⁴² The Tenth Circuit thus correctly concluded

⁴¹ Because of Commission positions on reviewability, this question of jurisdiction was *not* raised in the Ninth Circuit and was *not* decided there. In the event the petition in the *Superior* case, No. 684, This Term, is granted, this question may be more fully considered.

⁴² Thus, in *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956), a "rule" was considered upon direct review on the "rule-making" record, and in *American Trucking Associations, Inc. v. United States*, 344 U.S. 298 (1953), when the question of "arbitrariness" and "unreasonableness" was reached, the Court cited the "evidence marshalled before the Commission" (344 U.S. at 314).

that if, as the Commission says, the "general" rule-making order is *not* directly reviewable under Section 19(b), claims of "justification" requiring review of a record cannot be accepted under Section 19(b). However, the Ninth Circuit erred not only in concluding that a record is unnecessary to testing such claims, but also in proceeding without Section 19(b) jurisdiction to the question of "reasonableness" when the "rule-making" record involved had been and was still certified to the Tenth Circuit.

**C. The Tenth Circuit Correctly Requires Proceedings
on a Record**

The Tenth Circuit's conclusion is that the subject matter and Commission functions being performed require proceedings under Sections 7, 4, and 5. This is *not* a decision that a "trial-like" hearing is required in "rule-making"; the decision is that summary "rule-making" cannot suffice when the Commission acts on these particular subjects because of statutory requirements.

Under the holding, the Commission may consider Pan American's contract in a proper forum permitting testing of the "redetermination" clause and relevant economic facts. The Tenth Circuit has not directed "case-by-case" testing of this or any other clause, but leaves the Commission free to proceed in consolidated Section 7 cases, or in "area-rate" cases under Sections 4 and 5.⁴³ Therein, "favored nations," "spiral," or other clauses ultimately may be measured against the Act's standards, and "just and reasonable" alternatives may be substituted. There, orderly, in-

⁴³ See fn. 24, 25, 26, p. 36, *supra*.

formed Commission review of existing clauses, *and* of any substitutes, upon understandable records is not only possible, but is the only process which can result in clauses consistent with all of the Act's purposes and the "reasonableness" standard.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in Case No. 7303 below should be affirmed.

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APPENDIX

1. The Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717, *et seq.*, provides, in pertinent part as follows:

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or regulate such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regula-

tions, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and refer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Com-

mission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962) 15 U.S.C. § 717c].

Sec. 5 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected, by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discrim-

inatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

. . .

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor; or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificates shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service

or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

Sec. 16. The Commission shall have power to perform any and all acts and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find

necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

Sec. 19. (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the

filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section [1254] of Title 28. [52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b)]

2. The Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001, *et seq.*, provides, in pertinent part as follows:

Sec. 2. As used in this Act—

(c) Rule and rule making.—“Rule” means the whole or any part of any agency statement of general or particu-

lar applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.—"License" includes the whole or any part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

. . .

(g) Agency proceeding and action.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. [60 Stat. 237 (1946); 5 U.S.C. § 1001]

. . .

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. [60 Stat. 238 (1946); 5 U.S.C. § 1003]

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

NOTICE OF HEARING AND ISSUES

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

PROCEDURE

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the par-

ties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

AUTHORITY AND FUNCTIONS OF OFFICERS AND EMPLOYEES

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

DECLARATORY ORDERS

(d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty. [60 Stat. 239 (1946); 5 U.S.C. § 1004]

Sec. 7. In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence

and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. [60 Stat. 241 (1946); 5 U.S.C. § 1006]

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) Action by subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such

decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. [60 Stat. 242 (1946); 5 U.S.C. § 1007]

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION, *Petitioner*

v.

TEXACO INC. and PAN AMERICAN PETROLEUM
CORPORATION, *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR REHEARING BY RESPONDENT
PAN AMERICAN PETROLEUM CORPORATION

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Pan American Petroleum
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TEXACO INC. and PAN AMERICAN PETROLEUM
CORPORATION, *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

**PETITION FOR REHEARING BY RESPONDENT
PAN AMERICAN PETROLEUM CORPORATION**

Pan American Petroleum Corporation (Pan American), a respondent in the above-entitled case, prays that this Court grant rehearing of its decision entered in this case on April 20, 1964, and also respectfully prays for

(1) clarification of the Court's decision with respect to possible procedures upon ultimate remand to the Federal Power Commission; and

(2) clarification as to remand to the Court of Appeals for the Tenth Circuit for further proceedings upon issues *not* yet considered by that court and therefore *not* before this Court or decided in this case.

REASONS FOR GRANTING REHEARING

1. This Court's decision of April 20, 1964, has left uncertainty as to the exact nature of proceedings before the Federal Power Commission (Commission) now permissible upon ultimate remand to that agency. With reference to the Commission's "general" rules at issue, this Court stated (p. 8, slip opinion):

"The present regulations do not pass on the merits of any rate structure nor on the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants."

This Court also stated with reference to the same "general" rules (p. 11, slip opinion):

"Whether Pan American can qualify for a certificate of public convenience and necessity has never been reached. It has only been held that its application is not in proper form because of the pricing provisions in the contracts it tenders. No decisions on the merits have been reached."

In view of the limited holding below¹ and of the narrow question presented here by the Commission in its petition for writ of certiorari, the language quoted above appears to limit this Court's decision to the following:

(1) The Commission is empowered to "proscribe" contract pricing provisions by "rule" in advance of

¹ *Texaco Inc., et al. v. Federal Power Commission*, 317 F. 2d 796 (10th Cir. 1963).

tender of specific applications under Section 7 of the Natural Gas Act; and

(2) The Commission may so "proscribe" such provisions through general rule-making procedures spelled out in Section 4(b) of the Administrative Procedure Act, and need not follow the procedures specified in Sections 5, 7, and 8 of that statute.

However, Pan American understands this Court's decision also to mean that as to the "merits" of the specific price renegotiation clause in the contract here involved, the door remains open for a Commission decision "on the merits" of such a clause in the first instance either (1) in a proceeding on an application under Section 7(c) of the Natural Gas Act, or (2) through action upon a petition for "waiver" of the general rules involved in the instant case. Whether this is a correct understanding of this Court's statement that "[n]o decisions on the merits have been reached" is of critical importance because such renegotiation clauses have never been the subject of any formal proceedings before the Commission (R. 15-17), are widely used in the industry, and could satisfy Commission requirements in administration of the Act under the "area-rate" approach now being developed by the Commission. Rehearing thus will permit clarification as to permissible future action upon renegotiation clauses in conformity with this Court's opinion.

2. Of more immediate importance, rehearing here is required to eliminate any possible question, upon remand, as to issues *not* yet decided by the Tenth Circuit or by this Court. The Tenth Circuit limited its conclusions to the issues of (1) Commission power to "proscribe" clauses in advance by general rule, and (2) whether an "adversary" hearing must precede

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such Commission action formulating a rule (R. 119, 121). That court did *not* reach and did *not* decide other questions before it, including the questions of whether the "rules" involved meet the test of "reasonableness," and of whether the rules are arbitrary and an abuse of discretion in specific application to renegotiation clauses (see R. 119, 74, 80). These issues relating to "reasonableness" of the rules in their application thus were *not* before this Court in the instant case (see "Brief for the Federal Power Commission" before this Court, pp. 2, 15, 49),² and were *not* briefed by the parties before this Court. The decision of this Court on April 20, 1964, therefore clearly should *not* bar Tenth Circuit consideration of these undecided issues upon remand.³ However, to clarify posture of the case upon remand, Pan American respectfully requests rehearing and formulation of remand directives making clear that these still undecided issues now may be heard fully by the Tenth Circuit, and that that court may thus accord to Pan American the complete, full review upon all issues in the case contemplated by Section 19(b) of the Natural Gas Act. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Union Trust Co. v. Eastern*

² See also "Memorandum for the Federal Power Commission" in No. 684, This Term, *The Superior Oil Company v. Federal Power Commission*, pp. 2, 6, where the Commission called attention to the fact that the issue of "reasonableness" of the rules, "as applied," was "not reached" by the Tenth Circuit and was *not* before the Court in the instant case.

³ Beyond the decided issues of "power" and "hearing" requirements, under the decisions of this Court involving validity of administrative rules, the issue of "reasonableness" is an additional, separate test of validity. See *American Trucking Association, Inc. v. United States*, 344 U.S. 298, 314 (1953); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

Air Lines, 350 U.S. 962 (1956); *Slochower v. Board of Higher Education*, 351 U.S. 944 (1956): Since this Court has held *Storer* to be controlling here, Pan American should be accorded at least the same opportunity for further hearing below which this Court directed in its remand in *Storer*. The "remand" directive there was clearly stated:

"We reverse the judgment of the Court of Appeals and remand the case to that court so that it may consider respondent's other objections."
(351 U.S. at 206).

Elemental justice requires such clarity in the directive in the instant case.

3. In connection with the undecided issue of "reasonableness" of the rules in application to renegotiation clauses of the type in the instant case, Pan American respectfully calls attention to the fact that the decision in *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601 (9th Cir. 1963), *cert. den.*, May 4, 1964 (No. 684, This Term), is not and cannot be dispositive. The Ninth Circuit limited its own decision as to these Commission's rules to the contract then before it and the specific types of clauses there involved (322 F. 2d at 610).⁴ While "reasonableness" might have been briefed and decided here *had* the *Superior* petition in No. 684 been granted by this Court, denial of the *Superior* petition on May 4, 1964, also means that upon remand in the instant case, the Tenth Circuit is free to consider the "reasonableness" issue undecided by

⁴ The Ninth Circuit thus stated in reference to the Commission rules in issue: "We are not here concerned with the validity of those regulations insofar as they may affect price-changing clauses of a kind not involved in this proceeding."

this Court. Pan American therefore also respectfully requests clarification upon rehearing to make absolutely certain that upon remand, this Court's order of May 4, 1964, so denying the petition in the *Superior* case, cannot be interpreted as a bar to full consideration of the undecided issues in the Tenth Circuit. In this connection, specific reference is made to the "conclusion" appearing at page 49 of "Brief for the Federal Power Commission" in the instant case wherein the Commission requested reversal and remand "with instructions to conduct further proceedings in *Pan American* . . ." Such remand instructions now would serve to clarify any questions as to the permissible scope of further proceedings in the Tenth Circuit, particularly upon the undecided "reasonableness" issue.

4. With respect to the decision on the merits in the instant case, Pan American respectfully submits that the Court has erred in its construction of Section 4(b) of the Administrative Procedure Act. In view of the fact that the Court's decision as to venue for Respondent Texaco Inc. in the instant case may have resulted in no consideration of that portion of the "Brief for Texaco Inc." treating the merits of the issue as to Section 4(b), Pan American respectfully urges the Court, upon rehearing, to reconsider its construction of the Administrative Procedure Act in light of the extensive briefing as to Section 4(b), and the legislative history thereof, in the brief previously filed by Respondent Texaco Inc. in the instant case.

5. In summary, by this petition, Pan American respectfully urges the Court

(a) upon rehearing to reconsider its construction of the Administrative Procedure Act and decision that

Sections 5, 7, and 8 thereof were not applicable to the "rule-making" proceeding before the Commission;

(b) upon rehearing and in formulating the remand to the Tenth Circuit *in any event*, to clarify its decision as to availability thereunder to Pan American of a hearing or decision by the Commission, in the first instance, upon the "merits" of the renegotiation clause under Section 7(c) of the Natural Gas Act; and

(c) *of most importance*, upon rehearing and in formulating the remand to the Tenth Circuit *in any event*, to make clear as this Court did in the *Storer* case, that the still unheard, undecided issue of "reasonableness" of the Commission's rules as applied to renegotiation clauses of the type here in issue may be briefed, argued, and decided by the Tenth Circuit upon remand of the instant case.

CONCLUSION

For the foregoing reasons, Pan American respectfully prays for rehearing upon the Court's decision of April 20, 1964, in the instant case.

Respectfully submitted,

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May, 1964

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Re-hearing is presented in good faith and not for purposes of delay.

CARROLL L. GILLIAM

Counsel for Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, PETITIONER

v.

**TEXACO INC. AND PAN AMERICAN PETROLEUM
CORPORATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT**

**MEMORANDUM FOR THE FEDERAL POWER
COMMISSION IN OPPOSITION TO
"MOTION OF TEXACO INC. FOR ORDER PERFECTING
PROPER VENUE ON REMAND"**

The Federal Power Commission files this answer to Texaco's "motion" of May 11, 1964, so that it will be available for consideration in the event that the "motion" is not treated as constituting in substance a petition for rehearing.

To remand, or direct transfer of, this proceeding to the Court of Appeals for the Third Circuit, as Texaco requests, would involve a reversal of this

Court's decision that the court below erred in not *dismissing* the petition for want of venue (slip op., pp. 5-6). The usual mandate requiring the court below to proceed in accordance with this Court's decision would require the court of appeals to dismiss Texaco's petition. While such a dismissal would not in itself bar review by a court having jurisdiction and venue, the filing of a petition for such review is now barred by the expiration (as of January 29, 1963) of the statutory 60-day period within which such petitions must be filed (15 U.S.C. § 717r(b)).¹ We submit that the request that the Court reconsider and reverse the decision already rendered should be denied because it presents a new and separate claim (1) ~~not~~ heretofore briefed or argued, (2) not presently warranting consideration by this Court and (3) plainly without merit.

1. Texaco's present argument—that a petition for review under the Natural Gas Act, addressed to a court which lacks venue, may be transferred to a court where venue would exist—was not raised pre-

¹ The 60-day limitation is jurisdictional. *Michigan Consolidated Gas Co. v. Federal Power Commission*, 167 F. 2d 264 (C.A.D.C.); *Columbia Oil & Gasoline Corp. v. Securities & Exchange Commission*, 134 F. 2d 265, 267 (C.A. 3).

It may be noted that, when the Federal Power Commission filed its motion to dismiss, Texaco had 46 days remaining, of the 60 days allowed by the statute, in which it could have filed a protective petition in one of the courts of appeals to which it had previously taken orders of the Commission for review, or the Third Circuit. However, the 60-day period had expired by the time the court below heard oral argument on the motion. The statutory bar has therefore not been affected by the bringing of the case before this Court.

vously in this litigation, although the Commission has consistently requested dismissal of Texaco's petition for review, both in the court below (R. 72) and here. In our petition seeking certiorari, we specifically stated (Pet. p. 2, n. 1), "the Commission also reserves the right to argue that the court below erred in not dismissing Texaco's petition for review for lack of proper venue under Section 19(b) of the Natural Gas Act." And in the conclusion to our brief on the merits, we asked (p. 49) that the judgment of the court below in Texaco be remanded with instructions "to dismiss for lack of venue." Despite these clear statements of the relief requested by the Commission, Texaco at no time prior to the present motion even suggested the possibility of transfer.

2. The new argument does not presently warrant consideration by this Court. The only decision in point is that in *Gulf Oil Corp., et al. v. Federal Power Commission* (C.A. 5, No. 21151), opinion denying rehearing issued April 15, 1964,² where the court (Circuit Judges Tuttle, Rives and Wisdom) concluded that it had no authority, in similar circumstances, to transfer a petition for review under the Natural Gas Act.³ In addition, the transfer issue would appear to

² On March 9, 1964, the Fifth Circuit had, by *per curiam* order, granted the Commission's motion to dismiss for lack of venue, thereby denying petitioners' request for transfer in the event venue was found to be improper. That order was lodged with this Court prior to the oral argument in this case.

³ The same question of a court of appeals' authority to transfer, after expiration of the statutory period for seek-

have little prospective importance in view of this Court's definitive interpretation of the venue provision.

3. Texaco does not claim that there is express statutory authority for a court of appeals to transfer a review proceeding to another court of appeals where the court in which the petition has been filed lacks venue. In *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, this Court recognized that there is no inherent extra-statutory power in a lower federal court which lacks venue to transfer a case to one in which venue might properly have been laid. Referring to 28 U.S.C. 1406(a), which makes express provision for transfer in such circumstances among district courts, the Court explained (p. 466):

The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. * * *

ing review, has also been raised in *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, C.A. 10, No. 7587, where Panhandle's claim to venue also rests on the erroneous view that for purposes of the Gas Act a corporation may be located some place other than in its state of incorporation.

* Many earlier cases attest to the premise of *Goldlawr* that, in the absence of express statutory authority, a federal court without venue has no authority to transfer cases. See, e.g., *Schoen v. Mountain Producers Corp.*, 170 F. 2d 707, 713 (C.A. 8), certiorari denied, 336 U.S. 937; *Brown v. Heinen*, 61 F. Supp. 563 (D. Minn.) and cases cited; see also *MacNeil*

The attempt to invoke "inherent common law powers" of the courts (Texaco Motion, pp. 10-13)¹ ignores the restricted nature of the power of review here provided by Congress. This Court has characterized Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b), which corresponds to Section 19(b) of the Gas Act, as a "distinctive formulation of the conditions under which resort to the courts may be made," pointedly noting that "Congress determines the scope of jurisdiction of the lower federal

Bros. Co. v. Cohen, 264 F. 2d 186, 187 (C.A. 1); *Di Sabatino v. Mertz*, 82 F. Supp. 248, 249 (M.D. Pa.); 1 *Moore's Federal Practice* (2d Ed.), pp. 1902, 1904.

¹ Texaco's appeal to the "interests of justice" and its plea for "[f]airness, simple justice, and equity" comes belatedly from a party that deliberately chose to file its petition in the Tenth Circuit (a) after it had previously taken a number of other Commission orders to two other circuits for review (see the main brief of the Commission, p. 40, n. 39) and (b) after the Commission had previously made the same objection to venue in the Tenth Circuit with respect to two other Texaco petitions which were first filed in that Circuit (317 F. 2d 796, C.A. 10, Nos. 6947 and 7135).

In an apparent attempt to justify its taking this case to the Tenth Circuit, Texaco mistakenly asserts (Motion, p. 11, n. 4) that even if it had filed its petition for review in a different court it would have been "ripe for transfer" under 28 U.S.C. 2112 to the Tenth Circuit because of "Pan American Petroleum Corp's. petitions already there" (i.e., C.A. 10, Nos. 6973 and 7002, also disposed of by the same opinion below, 317 F. 2d 796). That Section of the Code, however, provides for transfer only where petitions seeking review of the same Commission order are filed in more than one circuit. Here Texaco and Pan American sought review of entirely different and separate orders. Moreover, Texaco's petition in No. 6947 below was filed over a month before any other petition in the entire group of cases relating to indefinite pricing clauses disposed of by the single opinion below.

courts." *Federal Power Commission v. Pacific Power & Light Co.*, 307 U.S. 156, 159.*

CONCLUSION

For these reasons Texaco's "motion" (which in substance seeks rehearing) should be denied and the judgment directed to the Tenth Circuit in accordance with the opinion of April 20, 1964.

Respectfully submitted.

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*The State cases and authorities relied upon by Texaco (Motion, pp. 7-9) support at most a proposition that the common law recognized the power of a court *with proper venue* to transfer a case, particularly if a fair and impartial trial could not be obtained in the transferor court. But, with perhaps one exception, the cases relied upon, while discussing this common law power, did not sanction transfers on the basis of any inherent power. Rather, the power at common law was discussed to help interpret the statutory or constitutional provision involved or to show that transfer authority existed because there had been an adoption of the common law.